

FILED  
JAN 24 1990  
F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1989

ROBERT COHEN, individually and as a Partner of  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO., SIMON COHEN  
COMPANY and ALJER REALTY CO. suing on behalf of  
himself and all other partners, both general and limited,  
and in the right and on behalf of SIMON COHEN  
REAL ESTATE & MANAGEMENT CO., SIMON COHEN  
REALTY CO., SIMON COHEN COMPANY and ALJER  
REALTY CO.,

*Petitioner,*

*against*

ROBERT J. REED, SIDNEY HACKELL, BEATRICE  
POTTER and the FIRST NATIONAL CITY BANK, in-  
dividually and as Executors of the Last Will and Testa-  
ment of SIMON COHEN, deceased, WILLIAM B.F.  
WERNER, individually and doing business as MID-IS-  
LAND HOSPITAL, JUAN SOTO, ELAINE WILSCHEK,  
J.S.K. CLEANING SERVICES, INC., JUDAH FEIN-  
ERMAN, JASDANE, INC., SHELDON KATZ, VOLUME  
FEEDING, INC., DADGAB, INC., BRIMSCO, INC.,  
SIMON COHEN REAL ESTATE & MANAGEMENT  
CO., SIMON COHEN REALTY CO. and ALJER  
REALTY CO.,

*Respondents.*

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**APPENDIX TO  
PETITION FOR A WRIT OF CERTIORARI  
VOLUME II OF TWO VOLUMES  
(Pages A234 to A464)**

---

MICHAEL E. SCHOEMAN  
*Attorney of record for Petitioner*  
SCHOEMAN, MARSH, UPDIKE & WELT  
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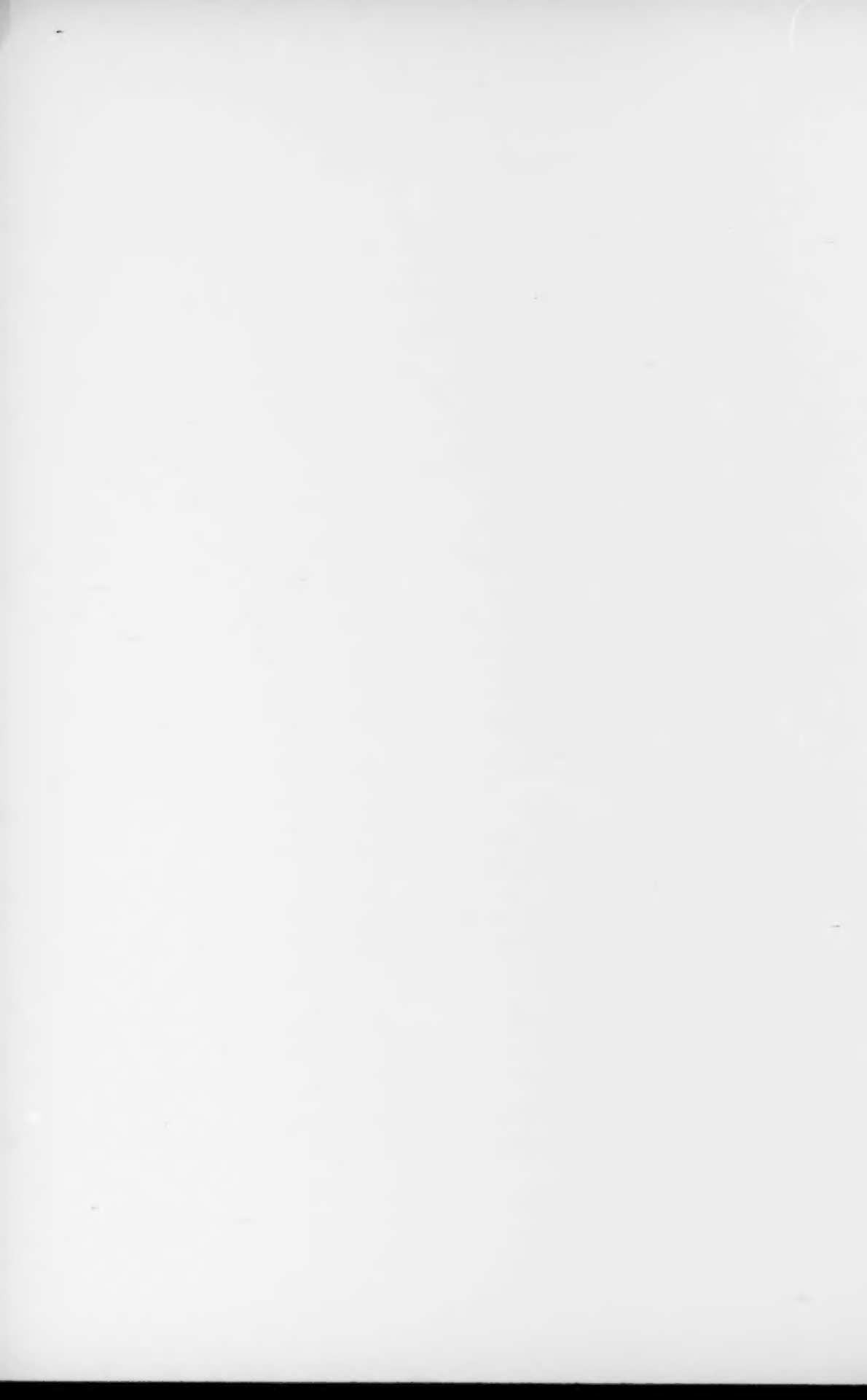
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SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION

ually and as a partner

of Simon Cohen Real :

Estate Co., etc.,

File 148704

: Dec. 11

Plaintiff,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants

:

ESTATE OF SIMON COHEN

Fix Attorneys' Fees :

Under SCPA 2110.

:

-----X

This motion to compel the court  
to render a decision pursuant to CPLR 2219  
is denied on the grounds that the decision  
has been rendered.

Settle order on five days'  
notice, with five additional days if  
service is made by mail.



A235

Dated: January 24, 1983

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a partner :  
of Simon Cohen Real :  
Estate Co., etc., : File No. 148704

Plaintiff, : ORDER

- against - :  
:

ROBERT J. REED, et al., :  
Defendants. :

ESTATE OF SIMON COHEN :  
Proceedings to Fix :  
Attorneys' Fees and :  
For Advice and :  
Discretion under SCPA :  
2110 :

-----X

Plaintiff, Robert Cohen,  
having moved for an order pursuant to  
CPLR 2219, compelling Hon. C. Raymond  
Radigan to issue an order determining  
the motion of petitioner Robert Cohen to  
substitute Schoeman, Marsh, Updike &  
Welt as counsel for plaintiffs and to



direct Stephen Hochhauser, Esq. to turn over to Schoeman, Marsh, Updike & Welt all records related to this litigation, and said motion having regularly come on to be heard.

NOW, upon reading and filing the notice of motion dated December 17, 1982, the affirmation of Michael E. Schoeman dated December 17, 1982, the affirmation in opposition to motion of Stephen Hochhauser, dated December 24, 1982, and the reply affidavit of Michael E. Schoeman, sworn to December 29, 1982, and due deliberation having been had thereon,

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for petitioner, it is

ORDERED, that petitioner's motion to compel the court to render a





decision be and the same is hereby  
denied on the grounds that the decision  
has already been rendered.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED February 25, 1983.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File # 148704  
Estate and Management  
Co., : Dec. # 115

Plaintiff, :

- against - :

ROBERT J. REED, et al.,:

Defendants. :

Estate of SIMON COHEN, :  
Deceased. Proceedings  
to Fix Attorneys Fees :  
and for Advice and  
Direction Under SCPA :  
§2110.

:

-----X

The order submitted by  
Mr. Schoeman on behalf of the plaintiff  
more closely conforms to the court's  
decision dated January 18, 1983 and will  
be signed with the addition of the  
following:



"ORDERED that the motion by the plaintiff for an order directing the turn-over of books, documents, computer files, etc., related to this case and in the possession of Robert Shannon, Esq. or Stephen Hochhauser, Esq., is denied without prejudice to a renewed motion if the parties can agree on an amount to be posted as security by the plaintiff to protect the attorneys' liens."

Proceed accordingly.

Dated: March 7, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a partner :  
of Simon Cohen Real : Index No.:  
Estate Co., et al., : 148704/71

Plaintiffs, ORDER

- against -

ROBERT J. REED, et al., :  
Defendants. :

Proceedings to Fix :  
Attorneys Fees and For :  
Advice and Direction :  
under SCPA §2110 :

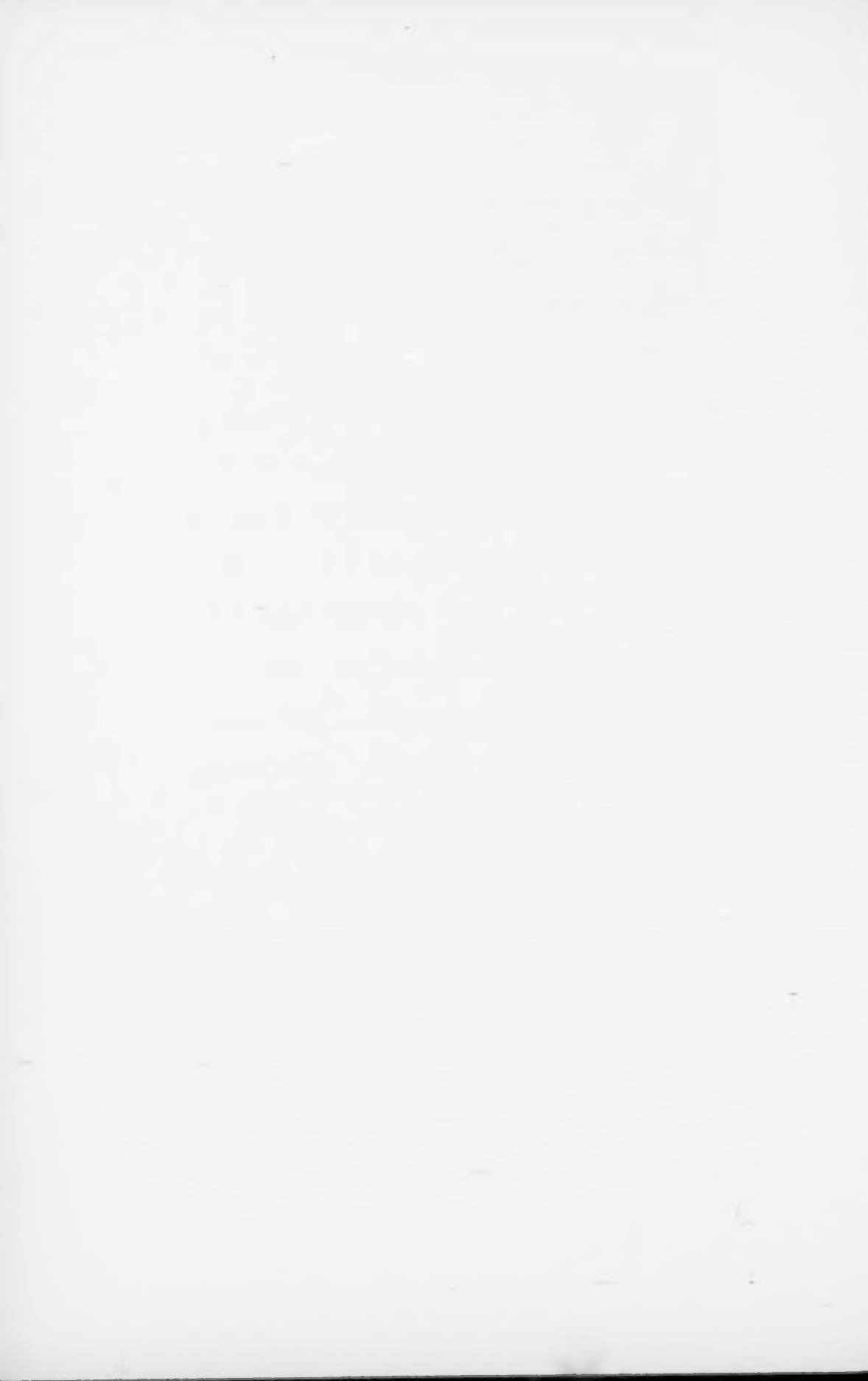
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Plaintiff, Robert Cohen,  
having moved for an order pursuant to  
CPLR 321, directing that his attorney  
Stephen Hochhauser be relieved and that  
Schoeman, Marsh, Updike & Welt be  
substituted in his place, determining  
the fee of Stephen Hochhauser, the fee  
of a former attorney, Robert V. Shannon,





and directing both attorneys to turn over certain records and for an order directing a stay of the proceedings in this Court as to issues raised by his prior motion, pending a determination in the United States District Court in an action by the plaintiff against Stephen Hochhauser (the "federal action"), and said Stephen Hochhauser having cross-moved for advice and direction and for a stay of the federal action, and after hearing arguments of counsel, reviewing the affidavits and memoranda of law submitted by the various parties, having rendered a decision dated August 2, 1982 and having issued an order on August 17, 1982 directing the holding of a hearing on notice of all interested parties to determine whether an order should be made substituting Schoeman, Marsh,



Updike & Welt as plaintiff's attorneys, whether Robert Cohen is in a conflict of interest and, if so, what corrective steps were to be taken, and said hearing having been held on October 4, 5 and 12, 1982, and the Court having rendered a decision on January 18, 1983.

NOW, upon reading and filing the order to show cause dated March 30, 1982, the affidavit of Robert Cohen in support thereof sworn to March 26, 1982, the notice of cross-motion of Robert V. Shannon dated April 20, 1982 and the affidavit in support thereof of Robert V. Shannon sworn to April 21, 1982, the notice of cross-motion of Stephen Hochhauser dated April 21, 1982 and the affirmation in support thereof of Stephen Hochhauser dated April 21, 1982, the affidavit of Robert Corcoran, sworn



to April 26, 1982, the affirmation of Morris Rochman dated April 30, 1982, the reply affidavit of Robert Cohen sworn to May 1, 1982 in further support of his motion and in opposition to Hochhauser's cross-motion for advice and direction, the affidavit of Robert W. Corcoran sworn to May 7, 1982, the affirmation of Morris Rochman dated May 10, 1982, the notice of motion dated September 30, 1982 and the affirmation of Michael E. Schoeman in support thereof dated September 30, 1982, the cross-motion of Stephen Hochhauser dated October 6, 1982, and the affidavit in support thereof and in opposition to the motion of Stephen Hochhauser, sworn to October 6, 1982, and the answering affirmation of Michael E. Schoeman in opposition to the cross-motion for stay



of the federal action dated October 11, 1982.

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for petitioner, it is

ORDERED, that petitioner's motion for substitution and ancillary relief be granted to the extent provided herein and in all other respects denied, that respondents' cross-motions thereto be denied, that petitioner's motion for a stay be denied and that respondent Hochhauser's motion for a stay be denied; and it is further

ORDERED, that Schoeman, Marsh, Updike & Welt be, and the same hereby are, substituted as attorneys of record for the plaintiffs in the place and stead of Stephen Hochhauser; and it is further





ORDERED, that the testimony and exhibits from the hearing of October 4, 5 and 12, 1982, previously ordered sealed by this Court, be and the same hereby are ordered to remain sealed and may be made available only to the Court, plaintiff and his counsel, and it is further

ORDERED, that the motion by the plaintiff for an order directing the turn-over of books, documents, computer files, etc., related to this case and in the possession of Robert Shannon, Esq. or Stephen Hochhauser, Esq., is denied without prejudice to a renewed motion if the parties can agree on an amount to be



posted as security by the plaintiff to  
protect the attorneys' liens.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED March 9, 1983.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real :  
Estate and Management  
Co., : File 148704

Plaintiff, : Dec. 256

- against - :

ROBERT J. REED, et al., :

Defendants. :

Estate of SIMON COHEN, :  
Deceased. Proceedings  
to Fix Attorneys Fees :  
and for Advice and  
Direction under SCPA :  
2110.

:  
-----X

This is an action commenced by  
the plaintiff individually and on behalf  
of certain partnerships, against his  
father's estate, the executors of the  
estate and other individuals. The  
plaintiff alleges that the defendants  
fraudulently deprived the partnerships  
of assets. The details of the numerous



causes of action have been discussed at length in previous decisions. One of these decisions was rendered following the plaintiff's motion to substitute his attorney and the attorney's cross-motion for advice and direction concerning the plaintiff's alleged inability to continue as a representative plaintiff because of an alleged conflict of interest.

The attorney, Mr. Hochhauser, had alleged that the plaintiff, Robert Cohen, had a personal animosity towards one of the defendant executors which prevented him from acting reasonably in connection with the settlement of the action and caused him to reject certain settlement proposals which were in the partnerships' best interests.

In a decision dated January 18, 1983 the court determined that at the present time there was





insufficient proof to establish that the plaintiff's rejection of certain settlement offers was motivated primarily by a personal dislike for the defendant, disassociated from his belief that the partnerships were protected by rejection of the settlement offer. It was determined in that decision that the partners should receive a new Notice, informing them of the current status of the litigation including a copy of the defendants' settlement offer (the first Notice had been forwarded, accompanied by unauthorized materials). The partners were directed in the Notice to respond in writing to the court on or before February 16, 1983. They were advised that these terms were to be considered minimal terms subject to modification by the court in order to benefit the partners.



The parties were informed in the January 18, 1983 decision that said Notice had been forwarded to the partners.

I

Some of the partners responded in their individual capacities as partners in one or more partnerships and/or as trustees on behalf of others. A significant number of individuals indicated that they were eager to see the litigation terminated.

Some of the partners simply answered in the affirmative or the negative. Other responses were accompanied by an explanation. Some of the partners accepted the proposal with certain conditions. The following comprises an analysis of the responses. In a few cases where a trustee responded on behalf of a partner and the partner responded as well, the responses were



identical, and the partner's response alone was counted.

Simon Cohen Real Estate and Management

Twenty-nine persons responded (each person counted only once whether responding individually and/or as trustee for one or more persons). Eighteen persons representing 17.50 units of the partnership accepted the proposal. Roslyn Rogove, whose name does not appear on the breakdown of interests as supplied to the court, accepted as well. Five persons representing 7.50 units rejected the proposal. Six persons representing 24.00 units accepted the proposal with one or more of the following conditions:

- 1) That the partners be permitted liberal inspection of the books and records of all partnerships;
- 2) That periodic accountings be furnished to the partners; and/or
- 3) That there be



disclosure of Dr. Werner's salary/distributions and access to his records. The parties have the following interests: Estate, 105.00 units; Robert Reed, 50.00 units; Elaine Wilschek, 2.00 units; Robert Cohen, 14.00 units.

Simon Cohen Realty

Eight persons responded. Four persons representing 20.74% of the partnership accepted the offer conditionally. Selma Gold, whose name did not appear on the breakdown of interests as supplied to the court, accepted the proposal as well. No partner rejected the offer. Four persons representing 21.76% of the partnership accepted the offer with one or more of the following conditions: 1) That the partners be permitted liberal inspection of the books and records of the partnerships; 2) That periodic accountings be furnished to the

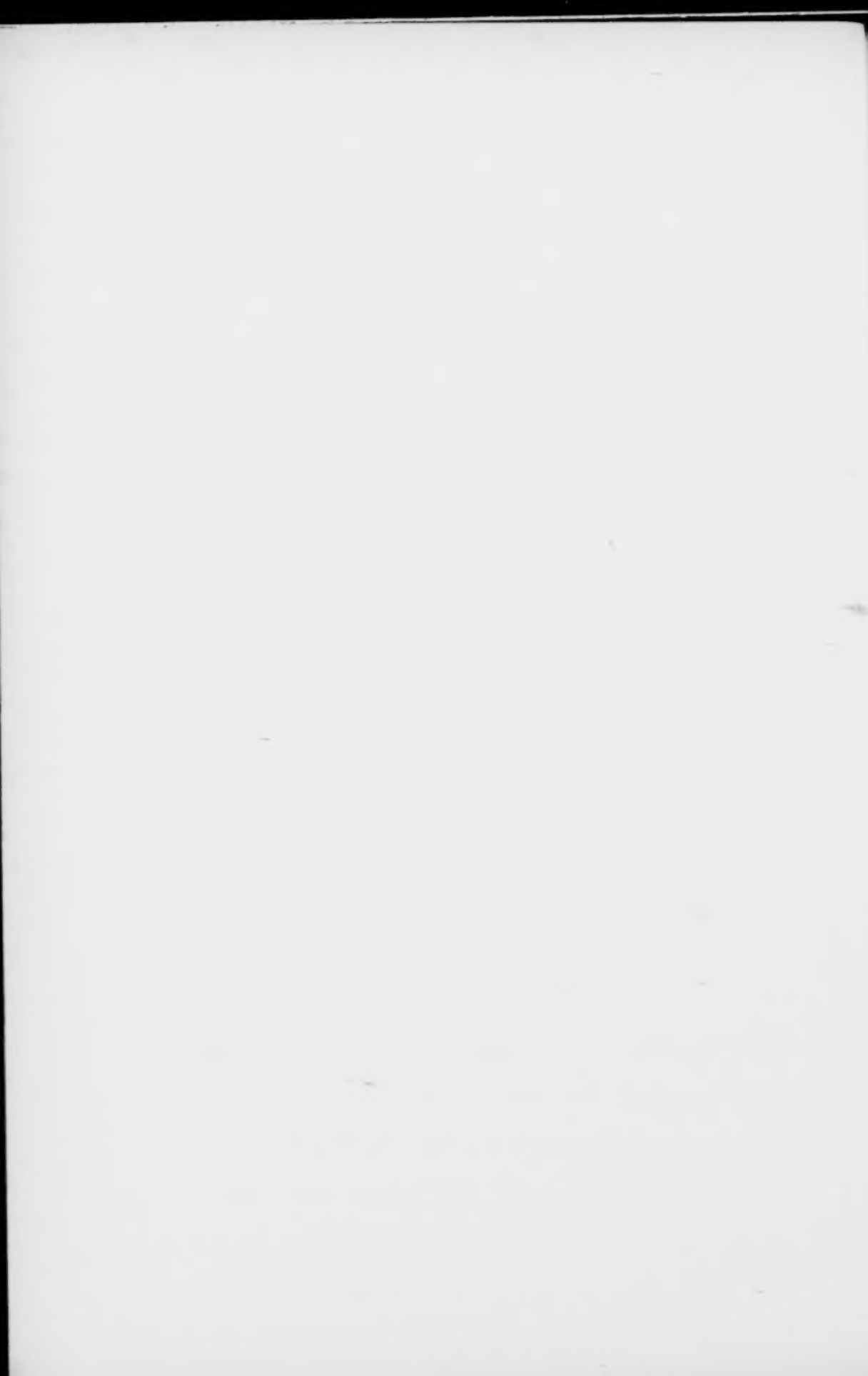




partners; 3) That there be disclosure of Dr. Werner's salary/distributions and disclosure of his books and records; and/or 4) That the total amount of the recovery go to Simon Cohen Realty. The parties have the following interests: Estate, 40.816%; Robert Cohen, 5.442%.

Aljer

Ten persons responded. Four persons representing 22.19% of the partnership accepted the offer unconditionally. One person representing 2.00% of the partnership rejected the offer. Five persons representing 20.98% accepted the offer on one or more of the following conditions: 1) That periodic accountings be furnished to the partners; 2) That there be disclosure of Dr. Werner's salary/distributions and access to his books and records; and/or 4) One trustee for partners in Aljer requested that all



proceeds go to Simon Cohen Realty. The parties have the following interests: Robert Cohen, 19.00%; Robert Reed, 2.00%.

Simon Cohen Company

The court was not supplied with information as to the breakdown of interests in this partnership. Two persons accepted the offer unconditionally and one person accepted with three of the conditions previously mentioned.

In considering the analysis the court assumes that Robert Cohen, if polled, would have voted in the negative in each instance where he has an interest.

II

An additional condition imposed by some of the partners was that they did not wish to share the legal costs thus far incurred by Robert Cohen. However, since this is a derivative



action, to the extent that Robert Cohen represents the partnerships' interests as opposed to his individual interests, the partnerships would be responsible for attorney's fees and costs to the extent allowed by the court.

The condition imposed with respect to the allocation of any settlement proceeds to Aljer or Simon Cohen Realty alone is clearly impractical.

The limitations with respect to Dr. Werner's salary imposed by some of the partners does not specify the amount of the limitation they have in mind. However, the court will take this objection into account in passing upon the reasonableness of the defendants' offer.

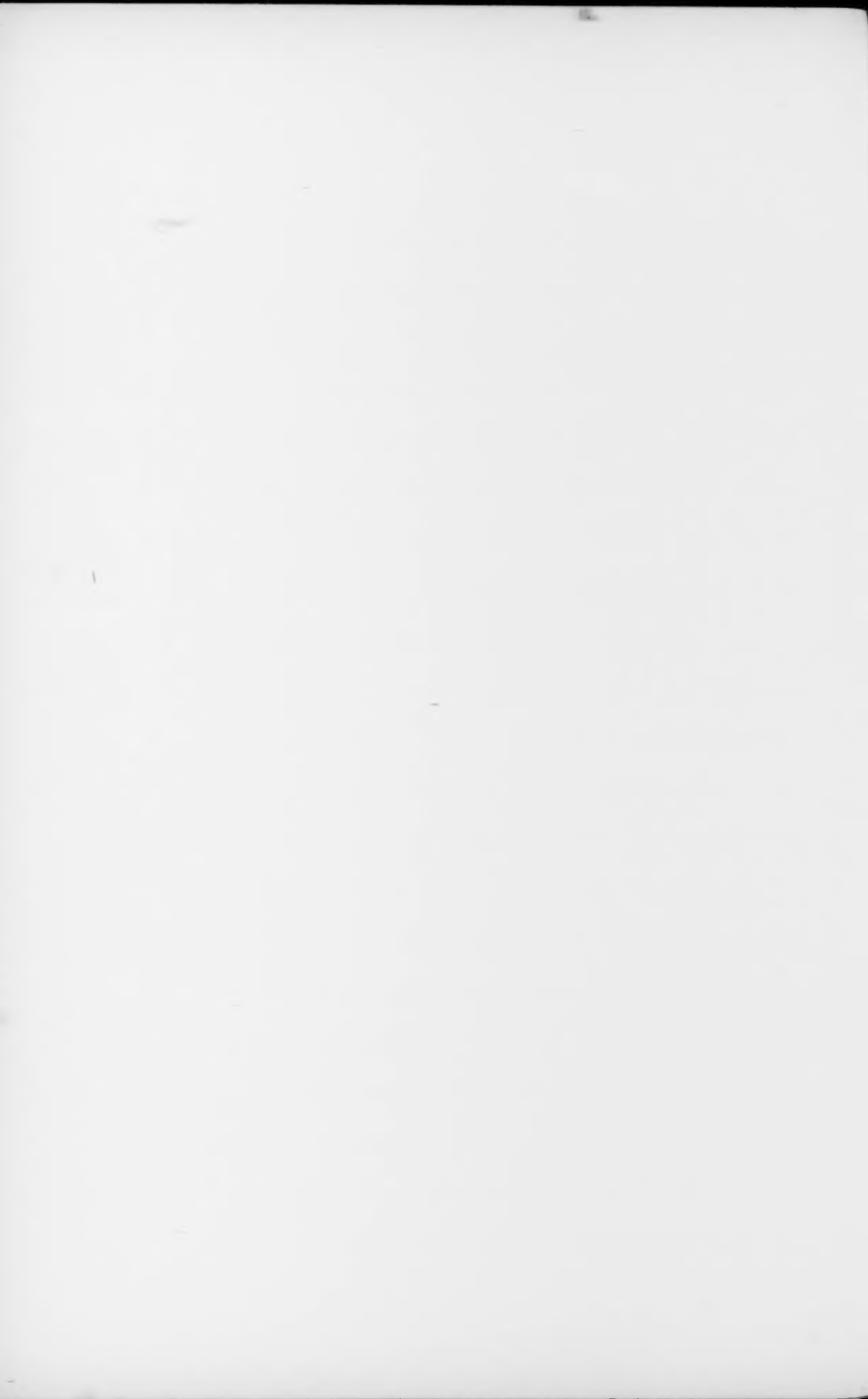
Lastly, one acceptance was conditioned upon disclosure of "Schedule A" referred to in section "F" which



concerns attorneys' fees and accountants' fees. Apparently the schedule was not forwarded along with the proposed stipulation to the partners. However, it is again noted that any allowance for attorneys' fees from the partnerships is a matter for ultimate determination by the court.

The conditions concerning review of the books and records of the partnerships, disclosure of Dr. Werner's salary and periodic accountings will be deemed, for the next stage of the proceedings, to have been made a part of the defendants' counter-offer.

A hearing will be held on May 24, 1983 at 9:30 a.m., at which time the court will give the representative plaintiff or any partner whose objection to any part of the settlement proposal is currently on file an opportunity to

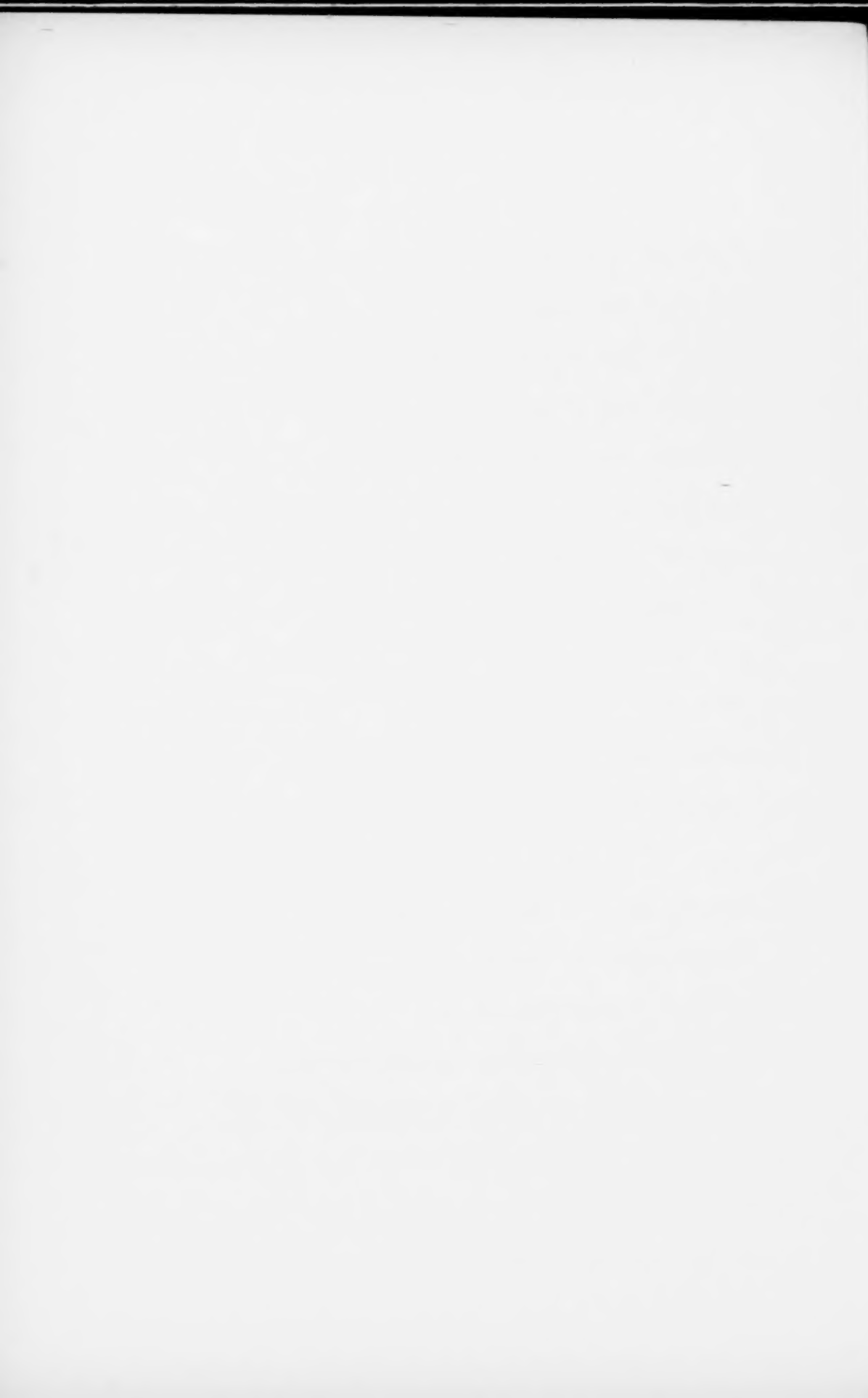




show cause why the proposed settlement should not be approved.

The court is mindful of the fact that the stewardship of a derivative suit is normally the responsibility of the representative plaintiff. Nevertheless, a settlement may be imposed over his objection (Flinn v. FMC Corp., 528 F2d 1169 cert den 424 US 967; Purcell v. Keane, 54 FRD 455) if found to be in the best interests of the partnerships.

In the present case the interests of the consenting partners in each partnership outweighs the percentage interest of the representative partner individually. The partners should be afforded an opportunity to have the court review the reasonableness of the offer at this stage in the proceedings.



If the defendants' offer, with the three conditions indicated above, is approved by the court, the defendants will be afforded an opportunity to either withdraw their offer because of nonacceptance of the three additional conditions, or reaffirm their offer with the three conditions incorporated. The same procedure applies if the court, following the hearing, makes any other modifications or additions to the stipulation for the benefit of the partners.

If the court does approve a settlement over the objection of Mr. Cohen, the court will continue the trial on his individual cause of action.


A copy of this decision will be mailed to each of the partners.

Settle order on five days' notice, with five additional days if service is made by mail.



A260

Dated: April 6, 1983

 C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real :  
Estate Co., et al., :  
Plaintiffs, : File 148704/71  
:  
- against - :  
:  
ROBERT J. REED, et al., :  
:  
Defendants. :  
:  
Proceedings to Fix  
Attorneys Fees and For :  
Advice and Direction  
under SCPA § 2110 :

-----X

This is a proceeding commenced  
by the plaintiff, Robert Cohen,  
individually and on behalf of certain  
partners. During the course of the  
proceedings the court determined that  
the partners should be apprised of the  
status of litigation and also of the  
offer of settlement which had been  
proposed by the defendants.  
Accordingly, the court forwarded a





notice to each of the partners, which incorporated a factual history of the case and the items indicated above and invited the partners to communicate with the court and indicate their support or rejection of the proposal.

Many of the partners responded. Some partners specifically indicated their approval, others indicated their approval with certain conditions, and a few partners rejected the defendants' offer.

In a decision dated April 16, 1983, the court reviewed the responses and scheduled a hearing for May 24, 1983, on notice to all of the partners, for the purpose of taking any testimony which would assist the court in determining whether the settlement should be approved assuming that certain conditions are accepted by the defendants. As the decision indicated,



two of the conditions proposed by some of the partners would not be part of this procedure. The first of these was that the proceeds of any recovery would go only to certain partnerships, and the second was that some partners did not wish to share the burden of attorneys' fees and expenses. The question of reimbursement of attorneys' fees and expenses for services rendered to the partnerships is one for determination by the court following a final decision in this matter, or a stipulation of settlement.

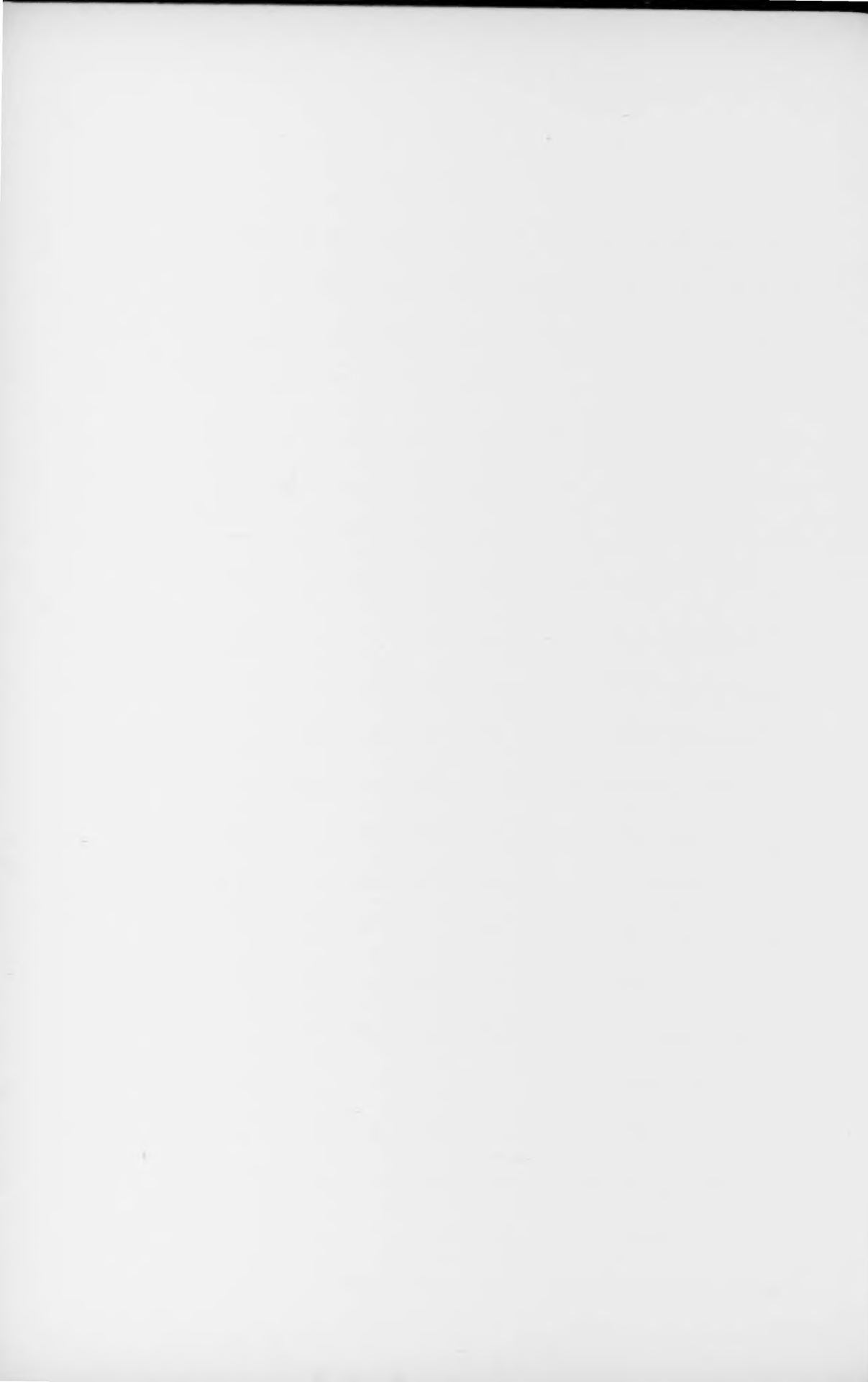
At the May 24, 1983 hearing, the plaintiff filed an affidavit indicating his objections to the procedures adopted. In particular, the plaintiff objected to the alleged "ex parte" communications with the partners. This was a reference to the responses received by the court. The responses



have always been and continue to be matters of public record. Had the plaintiff or his attorney requested to see the response following the court's receipt of them they would have been made available, as they were immediately following the hearing, on request.

An additional objection interposed by the plaintiff was that the April 16, 1983 decision contained a typographical error indicating that Mr. Reed owned 50.00 shares of Simon Cohen Real Estate and Management Company rather than .50 shares. The court notes the error, but this does not change the fact that the overwhelming majority of those responding favored acceptance of the proposal.

Mr. Cohen objects to the outlined procedure on the grounds that the settlement, if approved, would prejudice his individual rights. As the



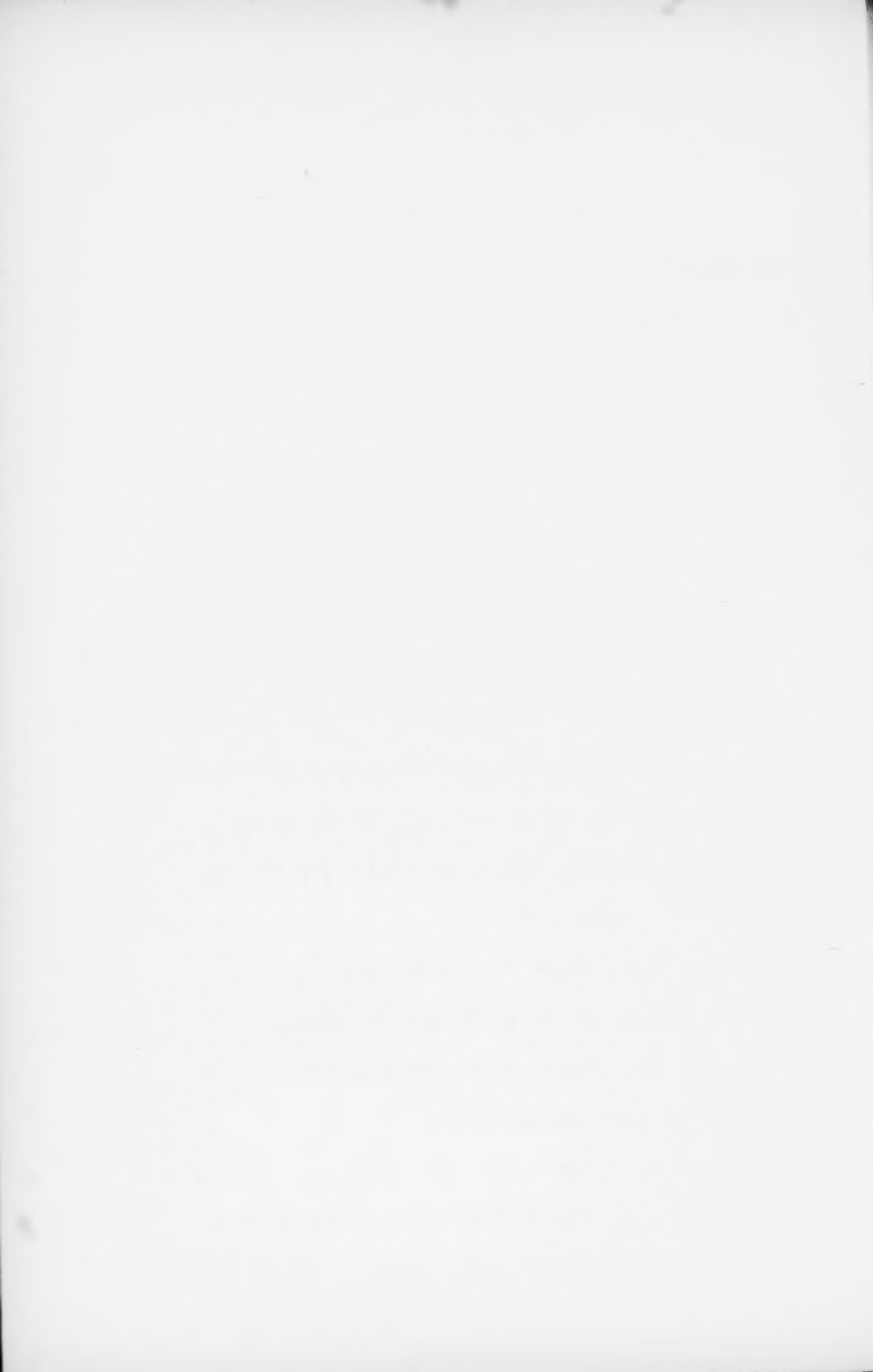
court's prior decision indicated, settlement of the derivative aspects of this suit would result in a discontinuance of the derivative causes of action only and not the plaintiff's individual cause of action (#17).

The court has determined that it would be in the best interests of all of the partners to give the defendants an opportunity to adopt the three conditions indicated above.

Accordingly, the defendants will have the opportunity to accept the following conditions and incorporate them into their settlement offer:

- 1) That the partners of each of the partnerships will be afforded access to the books and records of the respective partnerships.

- 2) That semi-annual accountings be furnished to the partners of each partnership.





3) That Dr. Werner's salary and distributions be disclosed.

The defendants should indicate their acceptance or rejection of these three terms by filing responses with the court on notice to the plaintiff by July 20, 1983. If the conditions are adopted this matter will be submitted for decision. If the conditions are not adopted we will proceed with the trial of this action.

The court notes that this is not a situation where it is attempting to substitute its judgment for that of a fiduciary. (Levine v Mellin, 79 AD2d 584, mod 81 AD2d 523). In this case, the court felt that the partners, who are really the plaintiffs in this case, should be notified of the offer of settlement, and for the reasons set forth in the court's prior decisions, the court can direct a settlement when



the majority of those interested so request.

Settle order on five days's notice with five additional days when service is made by mail.

Dated: June 22, 1983.

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File 148704  
Estate Co., et al., :  
 : Dec. 470  
Plaintiffs, :  
 :  
- against - :  
 :  
ROBERT J. REED, et al., :  
 :  
Defendants. :  
-----X

The application of the  
guardian ad litem dated June 1, 1983 in  
connection with a proposed change in the  
caption of this proceeding will be  
addressed at a future date.

No order need be submitted.

Dated: July 28, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : File 148704  
Estate Co., et al.,

: Dec. 518

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants.

-----X

In this proceeding the  
plaintiff and certain defendants have  
submitted proposed orders following the  
court's decision dated June 22, 1983.

The plaintiff's proposed order  
conforms more closely to the court's  
decision and will be signed with the  
following deletions:

(1) Beginning with the word  
"and" [page 2, line 4] and ending with  
the word "partners" [page 2, line 5];  
and





(2) The words "appropriate" [page 3, line 1] and "adequate" [page 3, line 5] are deleted and page 1, line 10 is corrected to indicate that the court rendered a decision on April 6, 1983.

Dated: August 9, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.  
ually and as a partner : 148704/81  
of Simon Cohen Real :  
Estate Co., et al., :

: ORDER

Plaintiffs,

:

- against -

:

ROBERT J. REED, et al.,

:

Defendants.

-----X

This action having been commenced by the plaintiff, individually and on behalf of certain partnerships and limited partners; and the defendants herein having offered, during the course of the trial of the within action, a proposal to settle the dispute between the parties on the terms contained in a certain proposed stipulation of settlement filed by the defendants with the Court; and the Court having notified the partners on whose behalf this action was instituted of the terms of the



proposed settlement, and having invited them to communicate with the Court their support or rejection of the proposal; and the Court, in a decision, dated April 16, 1983, having reviewed all of the responses from the partners, and having directed that a hearing be held on May 24, 1983, at which the plaintiff or any partner whose objection to any part of the settlement proposal was on April 16, 1983 on file was directed to show cause why the proposed settlement should not be approved and copies of said decision having been mailed to all parties and the said partners; and a hearing having been held on May 24, 1983; and after having heard counsel for defendants in support of the proposal of settlement upon the terms specified in the aforesaid stipulation, and counsel for the plaintiff in opposition thereto; and the Court wishing to determine



whether the defendants accept certain conditions and incorporate the same into their settlement offer;

NOW, upon the decisions of this Court, dated June 22, 1982, and August 9, 1983, and upon all of the pleadings and proceedings heretofore had herein; it is,

ORDERED, that the defendants, by filing appropriate responses with the Court on notice to the plaintiff, on or before July 20, 1983 indicate their acceptance or rejection of the following three (3) conditions: (1) that the partners of each partnership will be afforded access to the books and records of the respective partnerships including in the case of SCREAM, the books and records of Mid Island Hospital, subject to guidelines to be set by the Court; (2) that semi-annual accountings be furnished to the partners of each

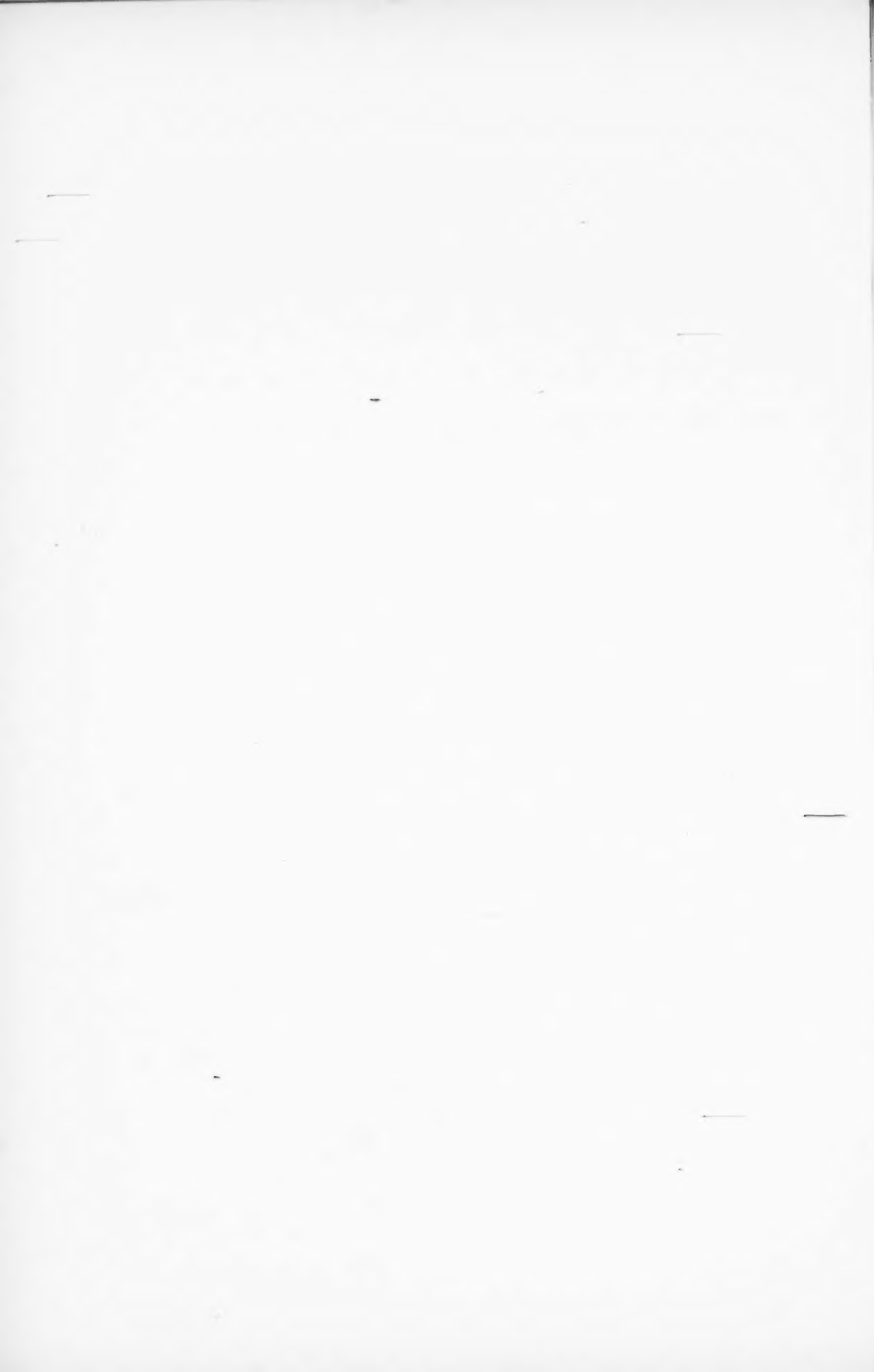




partnership including in the case of SCREAM an accounting of the financial affairs of Mid Island Hospital; and (3) that the defendant, Dr. WERNER's salary and distributions be disclosed; and, it is,

ORDERED, that if the defendants, on or before July 20, 1983, indicate their acceptance of the aforesaid conditions by filing responses, on notice to plaintiff, this matter will be submitted for decision; and, it is further,

ORDERED, that if the defendants indicate their rejection of the aforesaid three (3) conditions, or if they fail to file accepting responses

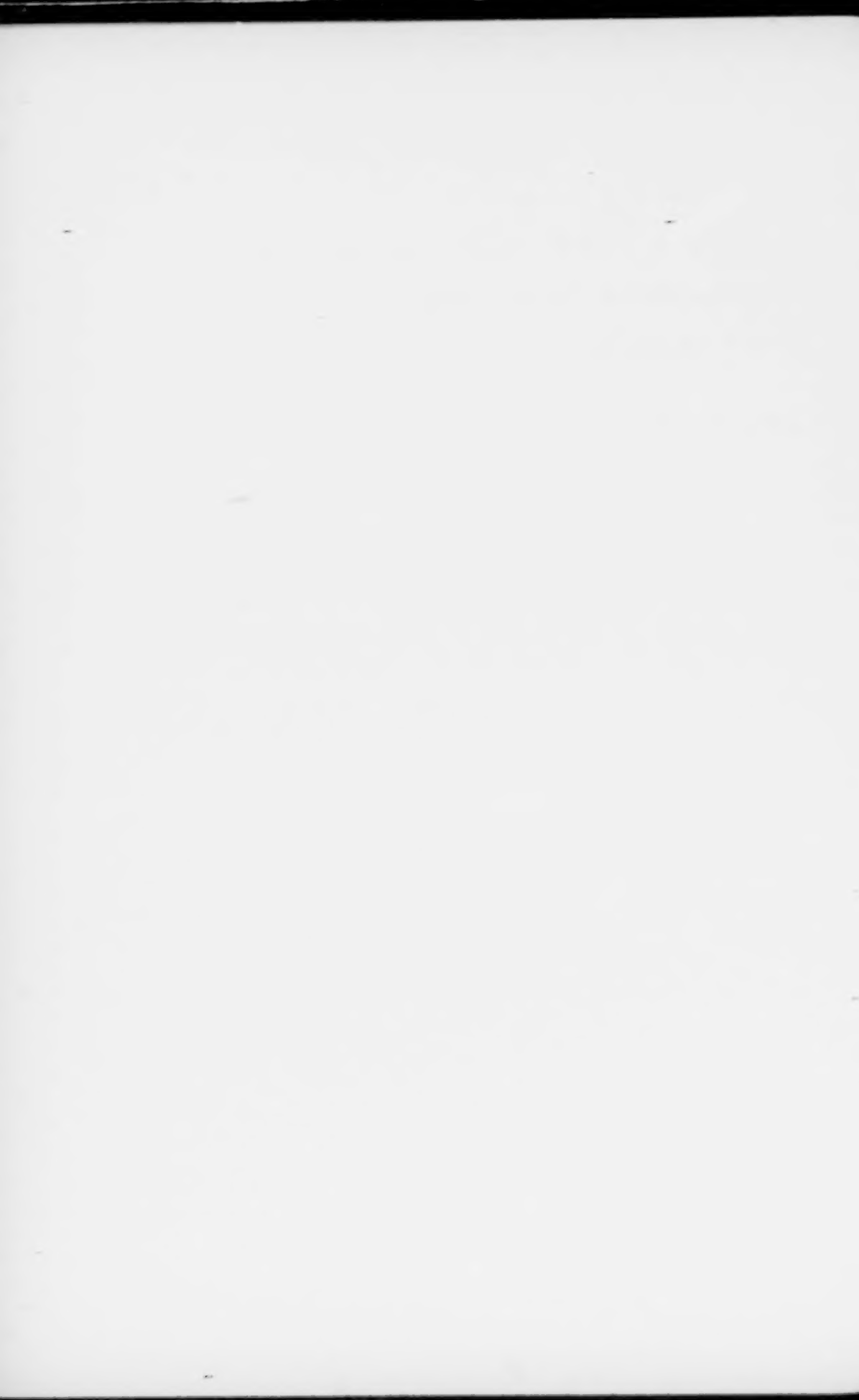


A275

on notice to the plaintiff, on or before  
September 14, 1983, trial of this action  
will be resumed.

Dated: August 9, 1983

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	File No.
ually and as partner	:	148704
of Simon Cohen Real	:	
Estate Co., et al.,	:	Dec. No. 676

Plaintiffs,

DECISION

- against -

ROBERT J. REED, et al.,

Defendants.

-----X

This is a motion by the plaintiff, Robert Cohen, for an order directing the Clerk of the Court to photocopy "pleadings, answers, motions and responses to motions."

The plaintiff's attorney has already been informed that if he will select which papers he wishes to have photocopied, the court will supervise the reproduction. The files in question



are a matter of public record and are available for review at any time.

However, it is not the responsibility of the court, nor is there sufficient staff to fulfill a request to have the files searched for all pleadings, motion papers and decisions. The court does not offer this service to any litigants.

This particular litigation spans a period of more than ten years. There are presently over twelve large files in the matter containing thousands of papers.





Accordingly, the motion is denied, without prejudice to following the procedure outlined above.

Dated: December 2, 1983

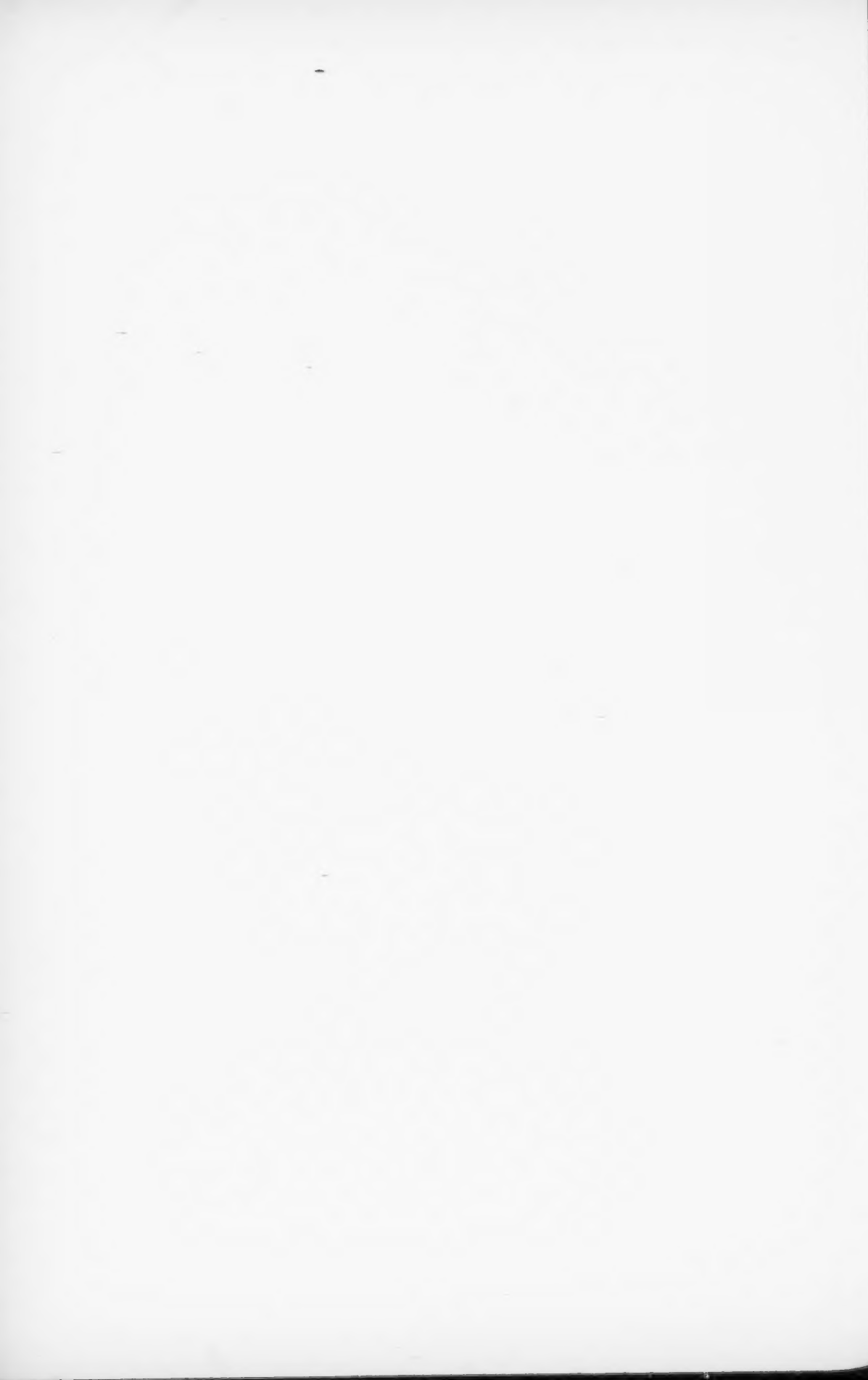
/s/

C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



A277b

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SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- :  
ually and as a partner :  
of Simon Cohen Real : DECISION  
Estate Co., Inc., :  
: File No. 148704  
Plaintiffs, :  
: Dec. No. 944  
- against - :  
: ROBERT J. REED, et al, :  
: Defendants. :  
: Estate of SIMON COHEN :  
-----X

This is a motion by the  
plaintiff for an order compelling the  
court to render a decision on the  
plaintiff's motion to re-settle an order  
dated August 9, 1983.

As the decision has been  
rendered, the question is moot. It is  
however noted that the original motion  
and cross-motion of the defendants was



removed from the list of those matters submitted for decision because of a discrepancy described in a decision released concurrently herewith. The matter was resubmitted and determined in that decision.

Dated: January 6, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704
	:	
Plaintiff,	:	Dec. No. 919
	:	
- against -	:	
	:	
ROBERT J. REED, et al,	:	
	:	
Defendants	:	
	:	
Estate of SIMON COHEN	:	

-----X

Before the court is a motion by the plaintiff and a cross-motion by certain defendants to re-settle an order dated August 9, 1983.

The order dated August 9, 1983 followed the court's decision dated June 22, 1983, which determined that it would be in the best interests of the partners to give the defendants an



opportunity to accept certain added conditions to the stipulation proposed by some of the partners. The decision set forth the three conditions and directed the defendants to indicate their acceptance or rejection of these conditions.

The plaintiff's attorney moved for an order modifying the August 9, 1983 order so as to include a fourth condition imposing a limitation on Dr. Werner's salary.

The defendants cross-moved for an order modifying the August 9, 1983 order on the ground that it did not conform to the June 22, 1983 decision. In the supporting papers, the defendants made reference to language purportedly contained in the defendant's offer of settlement, which was distributed to the



partners. This language differed from the language actually contained in the proposed stipulation which was distributed. The court sought clarification from the defendants of the discrepancy.

Thereafter, the attorney for the defendants filed an affidavit indicating that they would adopt the terms of the stipulation which was distributed by the court. They contend, nevertheless, that the language of the August 9, 1983 order does not conform to the decision dated June 22, 1983.

The decision directed the defendants to indicate their acceptance or rejection of the following conditions:

1. That the partners of each of the partnerships will be afforded



access to the books and records of the respective partnerships.

2. That semi-annual accountings be furnished to the parties of each partnership.

3. That Dr. Werner's salary and distribution be disclosed.

Although there are provisions in the stipulation for the inspection of the Hospital's records, they are not part of the conditions imposed by the partners. Provisions E(c), (iv) (1), (2), (3), (4) and (5) of the proposed stipulation set forth the procedures for production and audit of the records of the Mid-Island Hospital.

Accordingly, the defendants' cross-motion is granted and the following clause stricken from page 2 of the order: "including in the case of





SCREAM, the books and records of Mid Island Hospital subject to guidelines to be set by the court".

The plaintiff's motion is denied. The suggestion that Dr. Werner's salary be limited in some way was a suggestion made by one of the partners and concurred in by three other partners. However, the language of the partner's letter indicated that it was of lesser importance than the other conditions. In addition, the court does not believe that it is a reasonable condition. Accordingly plaintiff's motion is denied.

The defendants are to indicate their acceptance or rejection of the three conditions set forth in the order of August 9, 1983, as amended herein, on or before February 15, 1984. In



addition, the defendants (other than those represented by Speno Goldberg Moore Margules & Corcoran, P.C.) are to indicate their acceptance of the proposed settlement as distributed to the parties by the court (January 13, 1983) as part of the "Notice of Settlement Offer".

Proceed accordingly.

Dated: January 6, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704

Plaintiff,	:	Dec. 38
------------	---	---------

- against -

ROBERT J. REED, et al.,	:
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Defendants.	:
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Estate of SIMON COHEN	:
-----------------------	---

-----X

This action which was transferred from the Supreme Court, Nassau County, was commenced by the decedent's son Robert Cohen individually and as a general and limited partner of various partnerships. The defendants are the executors of Simon Cohen's estate, individually and in their fiduciary capacities. Essentially it is the contention of Robert Cohen that his father conspired with other individuals



to divert assets from the partnerships and that the decedent and others were responsible for perpetrating a fraud on the partners and for waste and mismanagement of partnership assets. There are seventeen causes of action, sixteen of which are brought by the plaintiff individually and on behalf of the partnerships. One cause of action is brought by the plaintiff solely on his own behalf. A prior motion for summary judgment resulted in dismissal of the first and third causes of action.

The partnerships on whose behalf this proceeding was commenced are the Simon Cohen Real Estate and Management Company (SCREAM) Simon Cohen Company (SCC) Alger Realty Company (ALGER) and Simon Cohen Realty (SCR).

The primary focus of this proceeding has been on the alleged breach of fiduciary duty on the part of





the decedent and others with respect to the profits of SCREAM. The plaintiff contends that the profits of the Mid-Island Hospital (M-I-H) which were to be paid to SCREAM pursuant to an agreement were instead diverted from SCREAM through "satellite" businesses and individuals by the decedent's design, in cooperation with others.

During the course of the trial, Robert Cohen, the representative plaintiff, moved for an order directing the substitution of Stephen Hochhauser, Esq. as plaintiff's counsel. Mr. Hochhauser cross-moved for advice and direction from the court based on which he contended was a conflict of interest on the part of the representative plaintiff. Mr. Hochhauser contended that Mr. Cohen was not capable of making reasonable judgments concerning the advisability of accepting certain



settlement proposals because of his alleged personal animosity towards one of the defendants, Robert Reed. Mr.

- Hochhauser contended that these personal feelings resulted in the rejection of settlement offers which were in the best interests of the partners.

In a decision dated August 2, 1982, the court determined that it was proper to address the issues raised by Mr. Hochhauser, as attorney for partners who had not actively participated in a derivative action (Pettway v. American Cast Iron Pipe Co., 576 F 2d 1167 cert den 439 US 1115) and to apprise the partners of the issues. The plaintiff was directed to mail a copy of the August 2, 1982 decision and a Notice of Hearing to all partners apprising them of (1) the status of settlement negotiations, (2) the allegations of conflict of interest, (3) the motion for



an order substituting counsel, and (4) the date of the hearing of items (2) and (3). A hearing was subsequently held and the motion for an order substituting counsel was granted. In a decision dated January 18, 1983, the court determined that the facts did not justify a disqualification of the representative plaintiff on the basis of a conflict of interest (NYLJ 1/26/83 p 15 col 1).

In the interim settlement negotiations continued. The plaintiff made a settlement offer and the defendants made a counter-offer which the plaintiff did not accept. The court determined that the partners should be notified of the defendants' proposal. Accordingly, a "Notice of Settlement Offer", "Description of Litigation" and a copy of the proposal were forwarded to each of the partners (decision dated



January 13, 1983) who were invited to communicate their acceptance or rejection of the offer on or before February 16, 1983.

In a decision dated April 6, 1983, the court reviewed the responses and certain demands imposed by some of the partners as a condition to their acceptance of the proposal (described below). It was then determined that for the next stage of the proceedings three conditions would be deemed part of the defendants' settlement proposal and at a later date the defendants would be afforded an opportunity to accept or reject the conditions. It was further directed that a hearing be held on May 24, 1983 to permit the representative plaintiff or any other partner whose response was on file to show cause why the settlement offer should not be approved. The only





partner who appeared on the date of the hearing was Robert Cohen. The Court then determined that the number of positive responses to the proposal justified submitting the proposal for court approval. The defendants accepted the three conditions and this proceeding has reached the stage where the court must determine whether the settlement proposal should be approved (Partnership Law 115-a subd [4]).

The most important factor to be considered in the settlement of a derivative action is the strength of the plaintiff's case balanced against the sum offered in settlement (City of Detroit v. Grinnell Corp., 495 F 2d 448, Marcus v. Putnam, 60 FRD 441). Other factors to be considered are (1) whether the parties negotiated at arm's length, (2) oppositions to the settlement, (3) expense of trial, and (4) whether



discovery has been completed so that the parties can assess the strengths and weaknesses of their positions (Rodgers v. Sound of Music Co., 74 Misc 2d 699).

With respect to the objections to the settlement, a prior decision of the court (NYLJ 4/19/83 p 14 col 6) reviewed the responses of the partners in detail. The overwhelming majority of the partners who responded favored the settlement and they represented a substantial percentage of the respective partnership interests, far outweighing the interests of the objectors, including the individual interest of the representative plaintiff.

Some of the partners who hold substantial interests in the various partnerships conditioned their approval on the following: (1) that the partners be permitted liberal inspection of the books and records of the partnerships,



(2) that periodic accountings be furnished to the partners, and (3) that there be disclosure of the salary and distributions to Dr. Werner (owner and operator of M-I-H) and his records. The defendants were asked whether they wished to accept these conditions and the following provisions were accepted by the defendants (1) that the partners be permitted to inspect the books and records of those partnerships in which they have an interest, (2) that semi-annual accountings of the partnerships will be furnished, and (3) that Dr. Werner's salary and distributions be disclosed.

An additional condition imposed by some of the partners was that they be relieved of the responsibility for attorneys' fees and expenses. Since this is a derivative action, to the extent that Robert Cohen represents the



partnerships' interests, the partnerships may be responsible for attorneys' fees and expenses. Other partners requested that the proceeds of the settlement be allocated only to those partnerships in which they have an interest. This is clearly an unreasonable condition. The request for a limitation on Dr. Werner's salary is a condition which the court said it would consider in determining the reasonableness of the settlement. The settlement does in fact provide for a limitation on Dr. Werner's compensation.

The remaining few objectors offered no factual support or cohesive arguments against the settlement. Robert Cohen's primary objection to the settlement appears to be that it does not provide for the removal of Mr. Reed from a position of control in M-I-H. In its previous decision the court found





that theis was not sufficient reason to disqualify the representative plaintiff. However, since this is not an issue which is incorporated in the complaint, the desire of the representative plaintiff to remove Mr. Reed from a position of control of M-I-H should not stand in the way of a settlement against the wishes of the other partners, if the settlement proposal is reasonable.

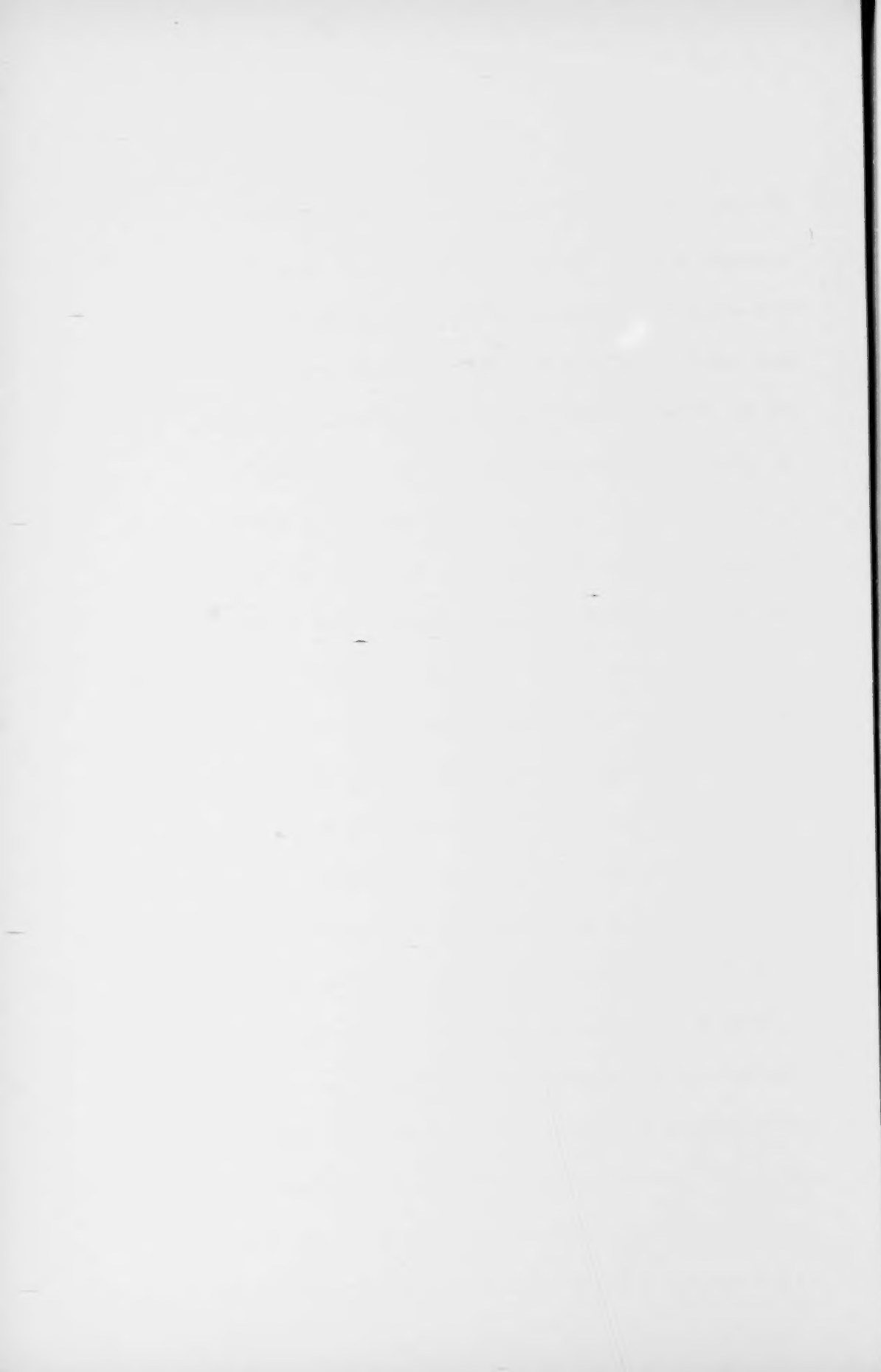
#### The Issues

In determining whether a settlement is reasonable the court has no authority to reach ultimate conclusions on issues of fact or law but should make some assessment of the probabilities of success (*Stull v. Baker*, 410 F Sup 1326). In this case the complaint alleges that the decedent in cooperation with other defendants withdrew monies from the partnerships and concealed withdrawals. It is



further alleged that the defendants conspired to defraud SCREAM of its profits by excessive payments for goods and services to M-I-H. Additionally, it is alleged that there was mismanagement of partnership assets. Not only must the plaintiff prove the facts alleged, he must prove damages as well. With respect to SCREAM, the plaintiff must not only show that the decedent hired friends and associates to provide services which could have been done "in-house" but that he incurred unreasonable expenses to the detriment of SCREAM.

The defendants vigorously contest the allegations. They have also raised the defense of the statute of limitations which may in fact be applicable to some of the causes of action. On a prior motion for summary judgment the court determined that the statute of limitations was a ground for



dismissing two causes of action but that as to some of the remaining causes of action, issues of fact as to when the actions complained of occurred made it impossible to compute the time period involved and to determine whether the statute of limitations barred the actions. The court notes an error in that decision which would not, however, have changed the result. In the decision the court determined that the statute of limitations was the later of six years from the date on which the acts occurred or two years from the date the representative plaintiff knew or could with reasonable diligence have discovered the alleged wrongdoing (CPLR §213 subd [8], §203 subd [f]). However, in a derivative action, knowledge on the part of the representative plaintiff would not defeat the cause of action belonging to



the partnership (Armstrong v. McAlpin, 699 F 2d 79, Mencher v. Richards, 256 AD 280). Knowledge or imputed knowledge on the part of the partnership rather than the plaintiff, individually, would be controlling. Employing this standard, the statute of limitations may still be a bar to some of the causes of action.

Additionally, the defendants raise the defense of laches which may be applicable to the equitable causes of action for an accounting, breach of trust and reformation of the contract between M-I-H and SCREAM.

#### The Settlement

In sum it cannot be said with any certainty that the partnerships will be successful on any or all of the causes of action. There are obvious questions of law and difficulties of proof which support approval of this





compromise (Zerkle v. Cleveland-Cliffs Iron Company, 52 FRD 151).

Moreover, the compromise has the added advantage of settling some conflicts which could not be resolved by a trial (Levin v. Mississippi River Corp. 59 FRD 353, affd 486 F 2d 1398). The proposal provides for periodic accountings for all the partnerships, and for inspection of the records of M-I-H by SCREAM, which hopefully will prevent future disputes. This is an added factor favoring approval (see Purcell v. Keane, 54 FRD 455).

The court, having presided over this trial which has produced to date, a record in excess of 5,500 pages, is of the opinion that this settlement is in the best interests of the partners. The court is aware that settlement offers in class and derivative actions are rarely approved



in the absence of the consent of the representative plaintiff or plaintiffs.

The position of the representative plaintiff is, however, similar to that of a guardian ad litem (*Denicke v. Anglo California National Bank*, 141 F 2d 285 cert den 323 US 739) in that he represents the interests of those who have not appeared or cannot appear.

Accordingly, in cases where the court determines that the settlement proposal is in the best interests of those on whose behalf the action is brought, the settlement may be approved without the consent of the plaintiff (*Flinn v. FMC Corp.*, 528 F 2d 1169 cert den 424 US 967, *Purcell v. Keane*, 54 FRD 455). A representative plaintiff has a duty not only to vigorously prosecute an action but to use wisdom and judgment in negotiating a reasonable settlement



(Norman v. Arcs Equities Corp., 72 FRD 502).

Accordingly, the proposed settlement is approved except for imposing condition 1E on the plaintiff. If the plaintiff and defendants can agree as to the plaintiff's status as a partner in SCREAM, they may enter into a stipulation of settlement concerning same. If they cannot, but the defendants otherwise agree to the proposed settlement, then the court will continue to take evidence on that issue as well as the matter set forth under Article Seventeenth of the plaintiff's complaint which was brought by the plaintiff individually.

The court will conduct a conference to establish a schedule for the submission of papers and a hearing on the question of attorneys' fees for services rendered to Mr. Cohen,



individually and those fees and expenses which may be chargeable to the partnerships.

A copy of this decision will be mailed to each of the partners. The defendants are directed to deposit with the Chief Clerk of the Surrogate's Court the sum of \$300.00 to cover the cost of copying and mailing a copy of this decision to each of the partners.

Settle order on five days' notice with five additional days if service is made by mail.

Dated: April 27, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., et al.,	:	148704
	:	
Plaintiffs,	:	Dec. No. 125
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

The motion for a new trial is rendered moot by the court's decision dated April 27, 1984 which approved the settlement of this action. Accordingly, the motion is denied. As to the remaining issues to be tried, the court will give directions concerning same at a later date.

Accordingly, the motion is denied. This decision constitutes an



order of the court.

Dated: May 10, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



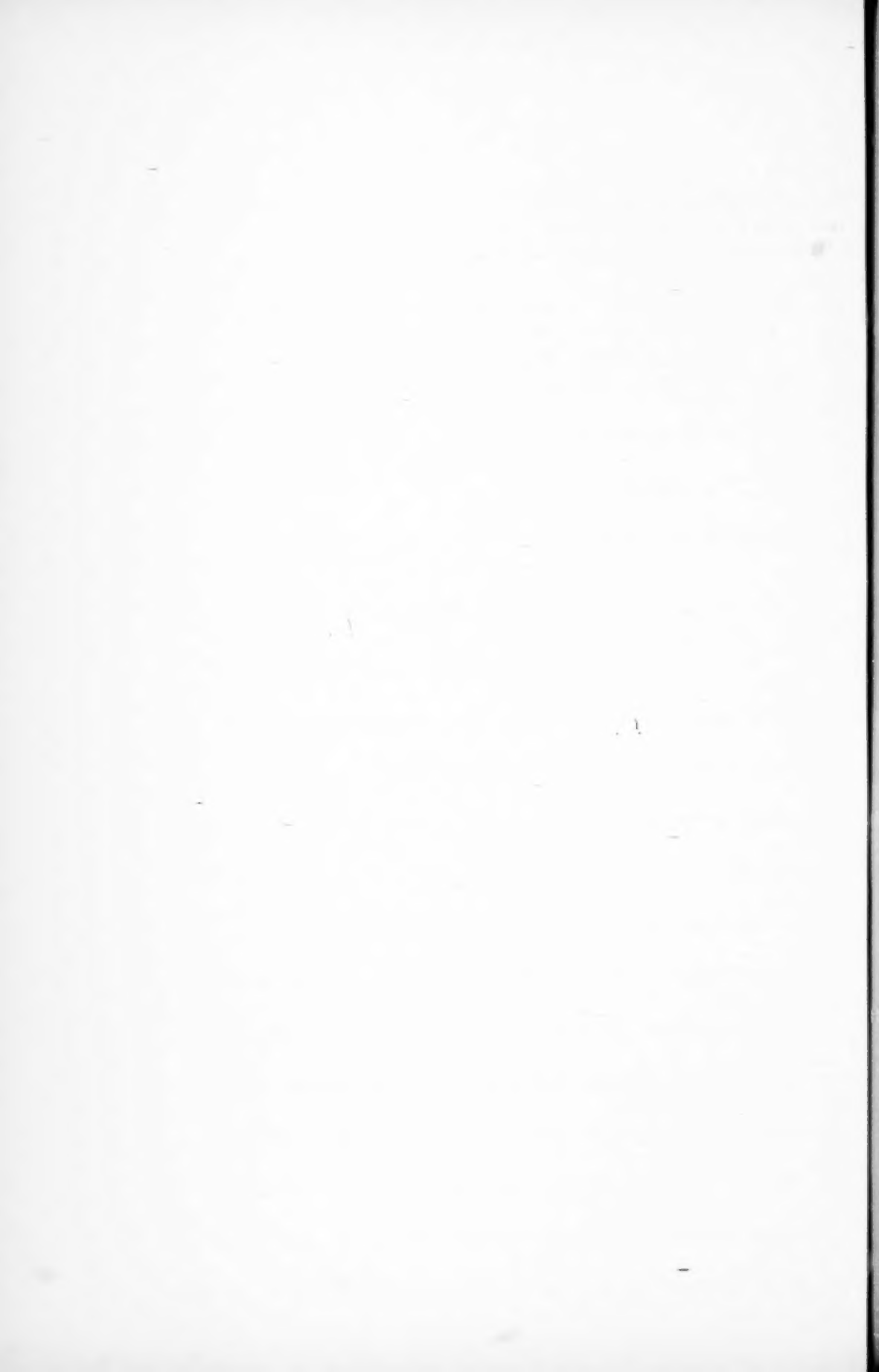
SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	<u>DECISION</u>
ually and as a partner	:	File No.
of Simon Cohen Real	:	148704
Estate Co., et al.,	:	
	:	Dec. No. 344
Plaintiffs,	:	
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

In this miscellaneous proceeding an order and counter-order have been submitted, neither of which accurately reflects the court's decision of April 27, 1984, and the terms of the stipulation of settlement which was approved. The order should contain a recitation of the prior proceedings in this court and should incorporate the stipulation of settlement itself rather than a re-wording of the stipulation. Additionally, the order should reflect the court's decision with respect to the



17th cause of action as well as the question of the plaintiff's status as a partner in the Simon Cohen Real Estate and Management Company.

Resettle order on five days' notice with five additional days if service is made by mail.

Dated: July 3, 1984

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	Index No.
ually and as a partner	:	148704/71
of Simon Cohen Real	:	
Estate Co., Inc., et	:	
al.,	:	<u>ORDER</u>

Plaintiffs, :

- against - :

ROBERT J. REED, et al.,:

Defendants. :

-----X

Plaintiff Robert Cohen having moved this Court for an order pursuant to CPLR 4402 granting to plaintiff a new trial on the grounds that the inordinate delay in the resumption of the pending trial had prejudiced his right to a fair trial and that such delay had violated plaintiff's right to a speedy and unprejudiced disposition of the matters at issue, and said motion having regularly come on to be heard,



NOW, upon reading and filing of the notice of motion dated January 31, 1984, the affidavit of Robert Cohen, sworn to January 30, 1984 in support thereof, the affirmation of Steven Louros, dated February 9, 1984 in opposition to said motion, the affirmation in opposition of Albert J. Fiorella, dated February 14, 1984, the affidavit of Robert J. Reed, sworn to February 10, 1984, in opposition to plaintiff's motion for a new trial, and said motion having been submitted and having been decided by the Court in an order dated May 10, 1984,

NOW, upon motion of Schoeman, Marsh, Updike & Welt, attorneys for plaintiff Robert Cohen, it is

ORDERED, that plaintiff's motion for a new trial be, and the same hereby is, denied; and it is further



ORDERED, that as to the  
remaining issues to be tried in this  
matter, further direction will be given  
to the parties at a later date.

/s/ C. Raymond Radigan  
Judge of the  
Surrogate's Court

[ENTERED July 23, 1984.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	DECISION
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704
	:	
Plaintiff,	:	Dec. No. 929
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

In this miscellaneous proceeding a decree and counter decree have been submitted. The decree submitted by the defendants will be signed with the following changes:

(1) On page 34, the last paragraph after the phrase "shall be allotted to the payment of attorney's fees for services rendered to", the following is inserted: "the partnerships and what if any reimbursement should be made to the representative plaintiff for attorneys'





fees and expenses paid on behalf of the partnerships."

(2) On page 39, the second to last paragraph is stricken and the last paragraph on page 39 which continues on page 40 is likewise stricken. The court reserves decision as to Karide Realty. A provision for Karide was not a part of the stipulation which was forwarded to the partners.

(3) On page 41, the words "this order" are stricken. The court's decision provided for the deposit of \$300 to cover the cost of forwarding a copy of the decision to the partners.

A copy of the decree will be forwarded to each of the partners. The defendants are directed to deposit with the court on or before December 12, 1984, the sum of \$200 to cover the cost of forwarding copies of the forty-one page decree.



This constitutes an order of  
the court.

Dated: November 21, 1984.

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court

11  
12  
13

SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ-	:	
ually and as a partner	:	
of Simon Cohen Real	:	File No.
Estate Co., Inc.,	:	148704/71

Plaintiff,	:	DECREE
	:	
-against-	:	

ROBERT J. REED,	:	
et. al.,	:	

Defendants. :

-----X

Upon reading and filing:

1. the summons and  
complaint, dated August 13, 1971;
2. the notice of motion of  
the defendants seeking transfer of  
action from the Supreme Court, Nassau  
County to the Surrogate's Court, Nassau  
County, dated October 19, 1971, together  
with the supporting papers attached  
thereto;
3. the affidavit of  
plaintiff, sworn to November 1, 1971,



submitted in opposition to the motion to transfer the case to the Surrogate's Court;

4. the affidavit of Robert J. Reed, sworn to November 2, 1971, together with the papers attached thereto, submitted in reply to the plaintiff's affidavit in opposition to the transfer of the matter to the Surrogate's Court;

5. the supplemental reply affidavit of Robert J. Reed, sworn to November 9, 1971, submitted in support of the defendants' application to transfer the matter to the Surrogate's Court;

6. the consent of the Surrogate's Court, dated November 24, 1971, to the transfer of the action from the Supreme Court to the Surrogate's Court;





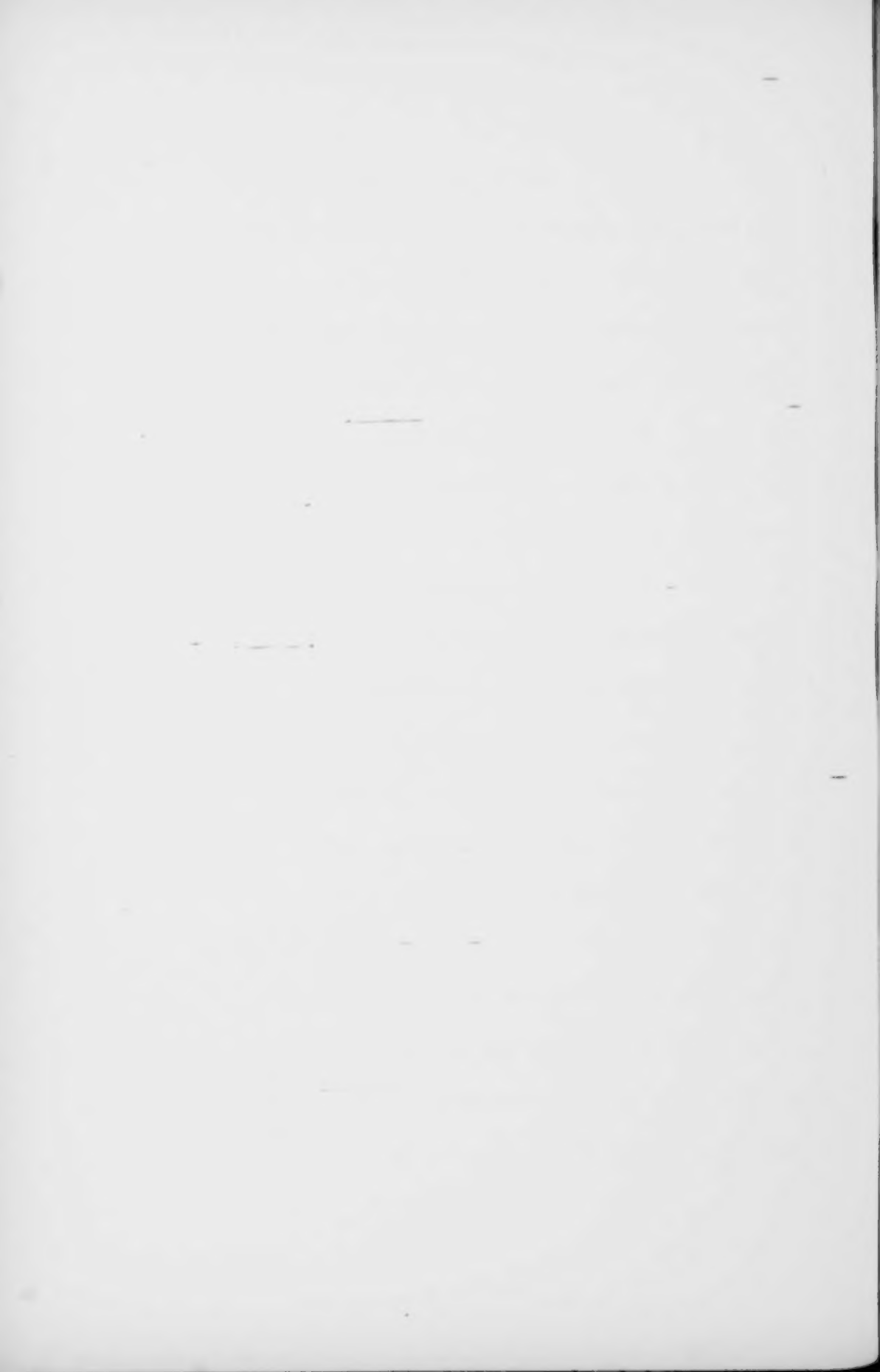
7. the short form Order of the Supreme Court of the State of New York, County of Nassau (Albert, J.), dated December 1, 1971, transferring the matter to the Surrogate's Court;

8. the defendant's demand for a bill of particulars, dated December 14, 1971;

9. the answer and counterclaims of defendants, Reed, Hackell, Potter, First National City Bank, Werner, Simon Cohen Real Estate and Management Co., Simon Cohen Realty Co. and Simon Cohen Company, verified December 22, 1971;

10. the defendants' notice of deposition, dated December 22, 1971;

11. the plaintiff's notice of deposition of defendants, Reed and Werner, dated March 9, 1972;



12. the plaintiff's reply, dated May 25, 1972, to the defendants' counterclaims;

13. the plaintiff's motion, dated May 25, 1972, to strike the defendants' counterclaims numbered second and third;

14. the decision of this Court, dated July 11, 1972, dismissing the defendants' counterclaims numbered second and third;

15. the plaintiff's notice of motion and affidavit of Stephen Hochhauser for Protective Order, dated October 19, 1972;

16. the affidavit of Robert W. Corcoran in opposition to plaintiff's motion to terminate examination before trial, dated October 25, 1972;

17. the decision of Surrogate Bennett denying without prejudice



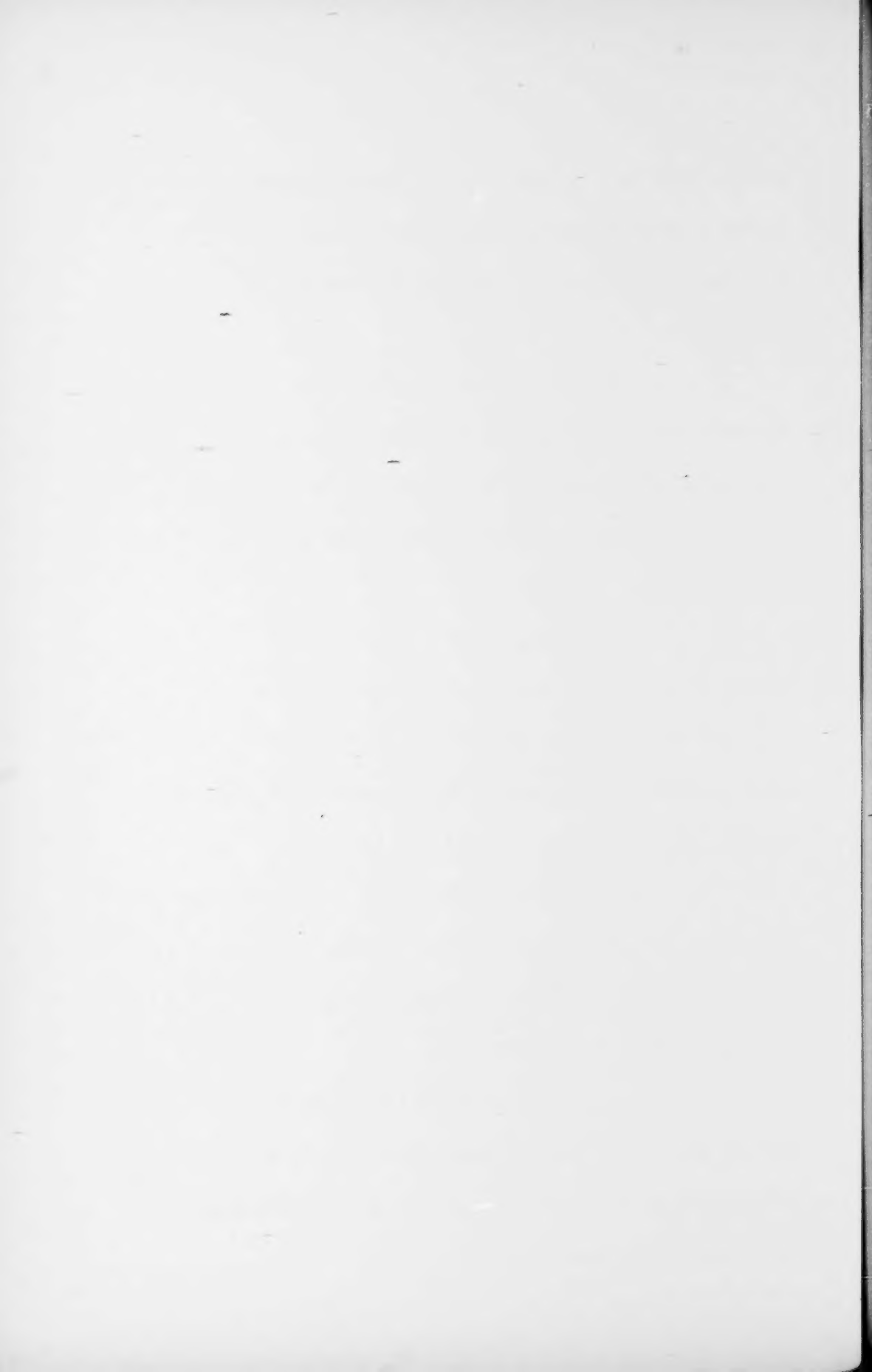
plaintiff's motion for a Protective Order; and scheduling deposition for November 30, 1972, dated November 17, 1972;

18. the affidavit and notice of motion of Stephen Hochhauser in support of plaintiff's motion to impose the sanctions of CPLR 3126, dated February 27, 1974;

19. the affidavit in opposition by Robert J. Reed to the relief sought by the plaintiff as specified in the notice of motion, dated March 13, 1974;

20. the affidavit in reply by Stephen Hochhauser in response to the answering affidavit of Robert J. Reed, dated March 19, 1974;

21. the plaintiff's motion, dated May 24, 1974, seeking an Order permitting the filing of a supplemental and amended complaint;



22. the decision of Surrogate Bennett to compel discovery from defendant, Robert J. Reed, dated May 28, 1974;

23. the decision of Surrogate Bennett appointing William E. Lotz, as referee, dated May 28, 1974;

24. the affidavit of defendant Reed, sworn to July 3, 1974, served in opposition to the plaintiff's motion for permission to serve an amended and supplemental complaint;

25. the decision of the Surrogate, dated July 23, 1974, granting the plaintiff's motion for leave to serve an amended and supplemental complaint;

26. the supplemental summons and the supplemental and amended complaint herein, dated July 24, 1974;

27. the Order of this Court, dated August 6, 1974, granting the





plaintiff leave to serve an amended and supplemental complaint herein;

28. the defendant's notice of motion and affirmation of Albert J. Fiorella in support of an application to dismiss the tenth cause of action pursuant to Section 213, Subdivision 9 of the CPLR, dated October 17, 1974;

29. the notice to take deposition upon oral examination of Robert Cohen, returnable October 31, 1974, dated October 18, 1974;

30. the answer, dated October 18, 1974, of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Co. and Alger Realty Co., to the plaintiff's amended and supplemental complaint;

31. the answer of the defendants, Feinerman and Jasdane, dated



October 30, 1974, to the plaintiff's amended and supplemental complaint;

32. the plaintiff's verified reply to counterclaims, dated November 1, 1974;

33. the decision of Surrogate Bennett with respect to defendants' motion to dismiss and/or summary judgment, dated December 18, 1974;

34. the decision of Surrogate Bennett to accept plaintiff's Order, dated February 10, 1975;

35. the Order with notice of entry (Surrogate Bennett) to commence trial on February 25, 1975;

36. the decision of Surrogate Bennett denying defendants' motion to dismiss the tenth cause of action, dated May 22, 1975;

37. the answer of the defendants, Juan Soto, J.S.K. Cleaning Services, Inc., Elaine Wilschek, Volume



Feeding, Sheldon Katz, each dated June 6, 1975;

38. the answer of the defendants, Feinerman and Jasdane, each dated June 12, 1975;

39. the demand of the defendants', Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, dated June 13, 1975, for a bill of particulars;

40. the plaintiff's notice of motion with supporting affidavit to vacate the demand for bill of particulars, dated June 18, 1975;

41. the defendants' affidavit in opposition to plaintiff's motion for an Order vacating demand for bill of particulars, dated July 7, 1975;

42. the decision of Surrogate Bennett with respect to the motion to



vacate the demand for bill of particulars, dated July 31, 1975;

43. the Order of Surrogate Bennett, denying plaintiff's motion for an Order vacating defendants' demand for a bill of particulars;

44. the plaintiff's verified bill of particulars, dated September 3, 1975;

45. the plaintiff's cross-notice of motion and supporting affidavit to fix discovery, dated September 26, 1975;

46. the affidavit of Robert Cohen in support of the cross-motion for discovery, dated September 26, 1975;

47. the affidavit of Robert W. Corcoran in opposition to cross-motion for discovery, dated September 30, 1975;

48. the decision of Surrogate Bennett granting discovery regarding the





cross-motion by the plaintiff, dated October 7, 1975;

49. the notice of motion and supporting affidavit for defendants, Soto, et al., for a Protective Order, dated October 15, 1975;

50. the Order with notice of settlement of this Court that defendants will have until October 20, 1980 to serve any motion papers addressed to plaintiff's bill of particulars and interrogatories, dated October, 1975;

51. the Order and letter of Surrogate Bennett, granting plaintiff's cross-motion and directing the defendants to appear on October 28, 1975 for the purpose of fixing a discovery schedule, dated October 20, 1975;

52. the motion of defendants, Robert J. Reed, et al., for an Order dismissing the complaint and for summary judgment, dated October, 1975;



53. the notice of motion and affirmation in support of motion by defendants, Robert J. Reed, et. al., to strike plaintiff's interrogatories;

54. the correction of the affirmation filed in support of motion by defendants, Robert J. Reed, et. al., for an Order striking plaintiff's interrogatories, dated October 20, 1975;

55. the supplemental affidavit by Albert J. Fiorella in support of above motion by defendants, dated October 20, 1975;

56. the notice of cross-motion and affidavit of Arthur Lubell in support of defendants' motion for a Protective Order, dated October 20, 1975;

57. the affirmation by Albert J. Fiorella of a true copy of the interrogatories, dated October 21, 1975;



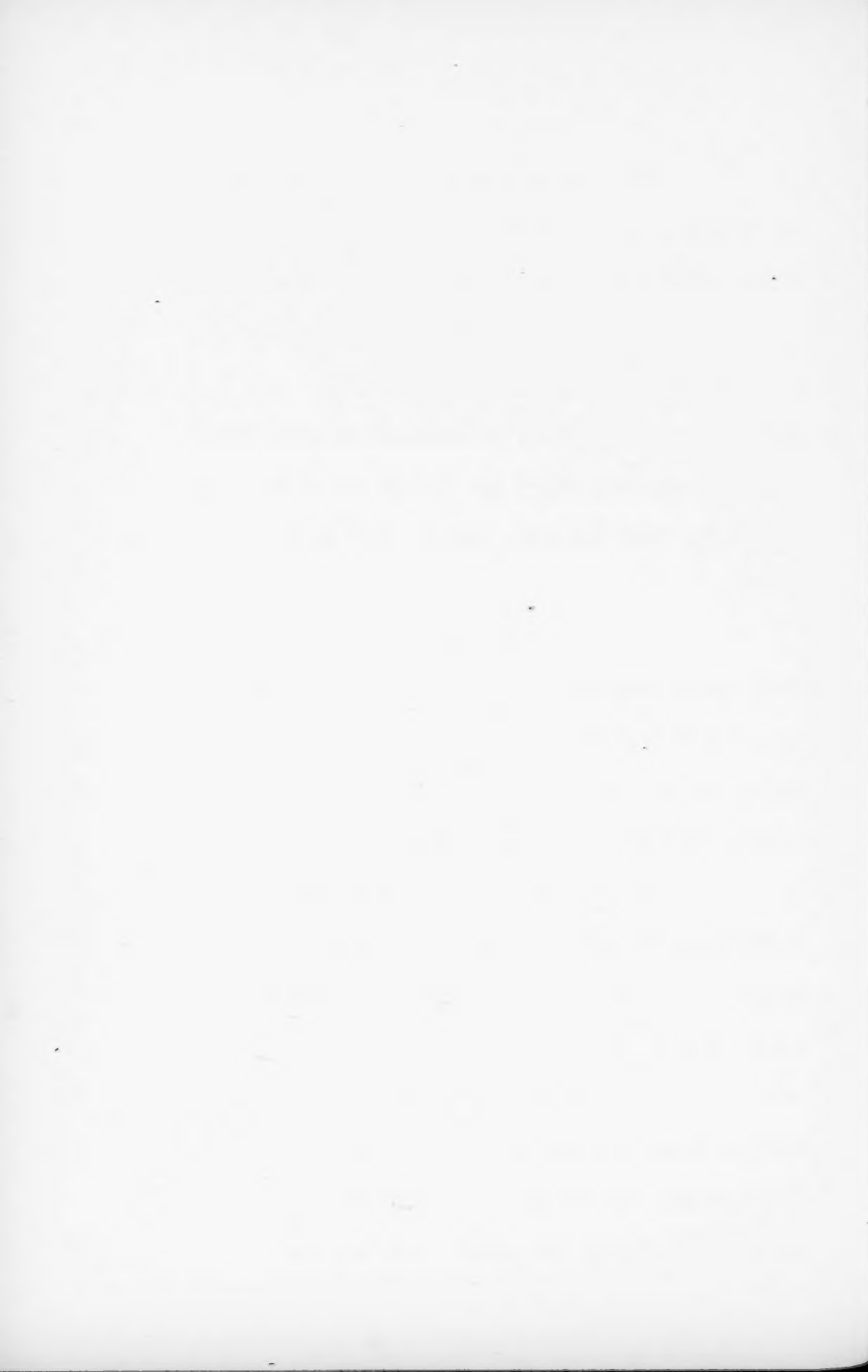
58. the plaintiff's affidavit in opposition to motion for a Protective Order striking the interrogatories;

59. the opinion of Referee Lotz stating that all documents pertaining to every partnership involved in this action must be filed in the Court by the Estate, dated March 10, 1976;

60. the decision of Referee Lotz that depositions be taken instead of interrogatories and granting defendants' motion for a Protective Order, dated April 8, 1976;

61. the Order granting defendants' motion for a Protective Order with notice of entry by Referee Lotz, dated April 30, 1976;

62. the plaintiff's notice of motion and affidavit of Stephen Hochhauser in support of plaintiff's motion pursuant to CPLR 3104(d) to



review the decision and Order of the Referee, dated April 8, 1976 and April 30, 1976, which granted the Protective Order, dated May 3, 1976;

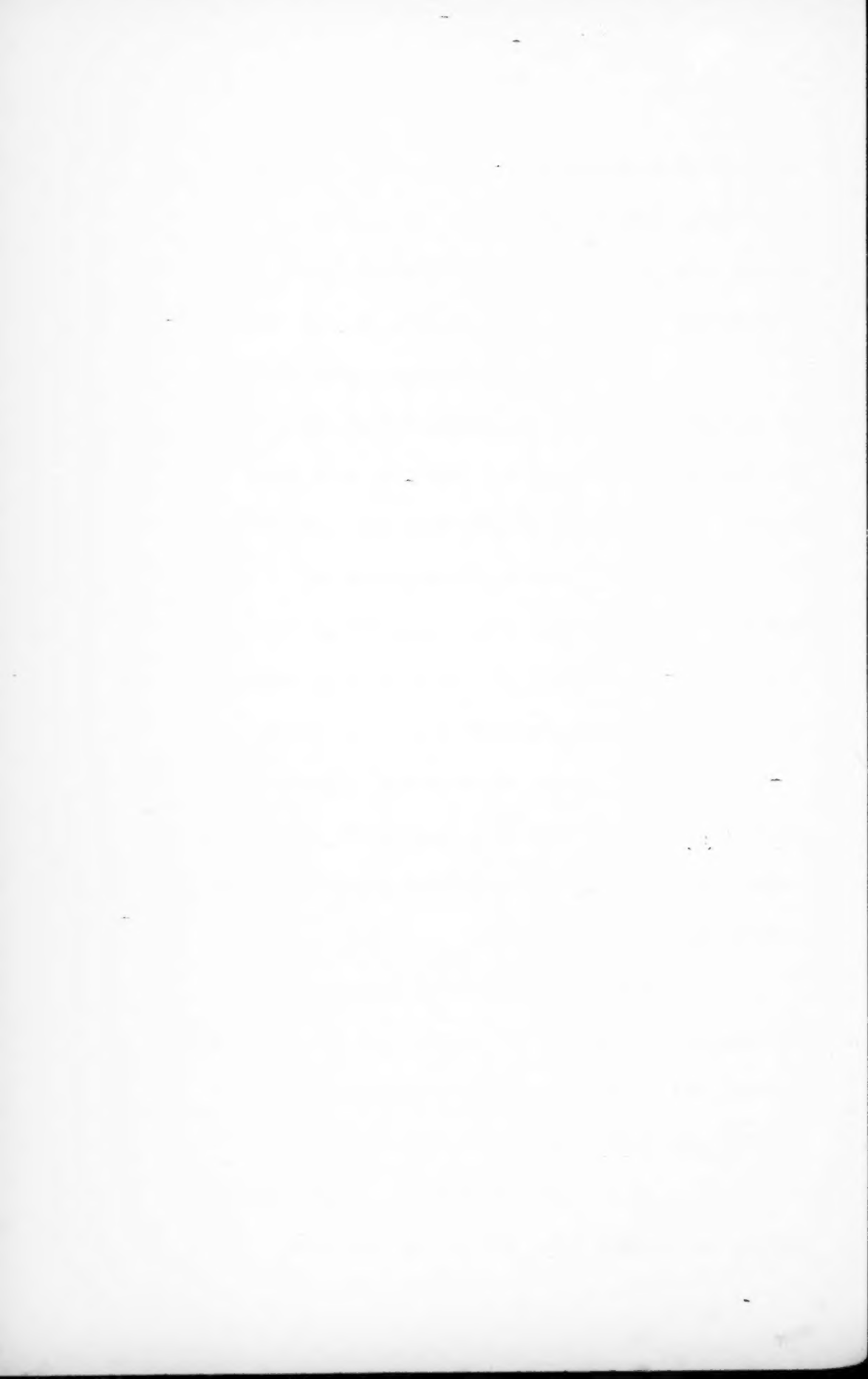
63. the answering affidavit of Arthur Lubell in opposition to plaintiff's motion to review and vacate Referee's Order, dated May 17, 1976;

64. the affirmation of Robert W. Corcoran in opposition to plaintiff's motion to review and vacate Referee's Order, dated May 26, 1976;

65. the directive from Referee Radigan to all parties for submission of pre-conference memorandum, dated June 10, 1976;

66. the affidavit of defendant, Robert J. Reed, in support of motion of defendants to dismiss complaint and for summary judgment;

67. the Order of this Court, dated December 10, 1976, directing





production of specified documents by the defendants;

68. the motion of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Alger, dated December 31, 1976, for an Order dismissing the complaint and for summary judgment, and upon the papers attached thereto;

69. the decision of Surrogate Bennett holding in abeyance the signature of either Order until determination of motion by defendants to dismiss, dated January 12, 1977;

70. the affidavit of Beatrice Potter, sworn to January 25, 1977, in support of the motion of the defendants for dismissal of the amended and supplemental complaint and for summary judgment herein;



71. the notice, dated January 31, 1977 of defendants, Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and Volume Feeding, Inc. of joinder of in the motion of the aforesaid defendants for dismissal of the action and for summary judgment;

72. the notice, dated February 16, 1977, of the defendants' Fienerman and Jasdane, joining in the motion made by the aforesaid defendants on December 31, 1976, for dismissal of the action and summary judgment herein;

73. the decision of this Court, dated March 31, 1977, rendered in connection with the plaintiff's motion for an Order disqualifying the referee who had theretofore been appointed to supervise disclosure, and upon the Order of this Court, dated April 20, 1977, denying such motion;



74. the memorandum-decision and Order and this Court, both dated April 20, 1977;

75. the decision of this Court, dated April 24, 1977;

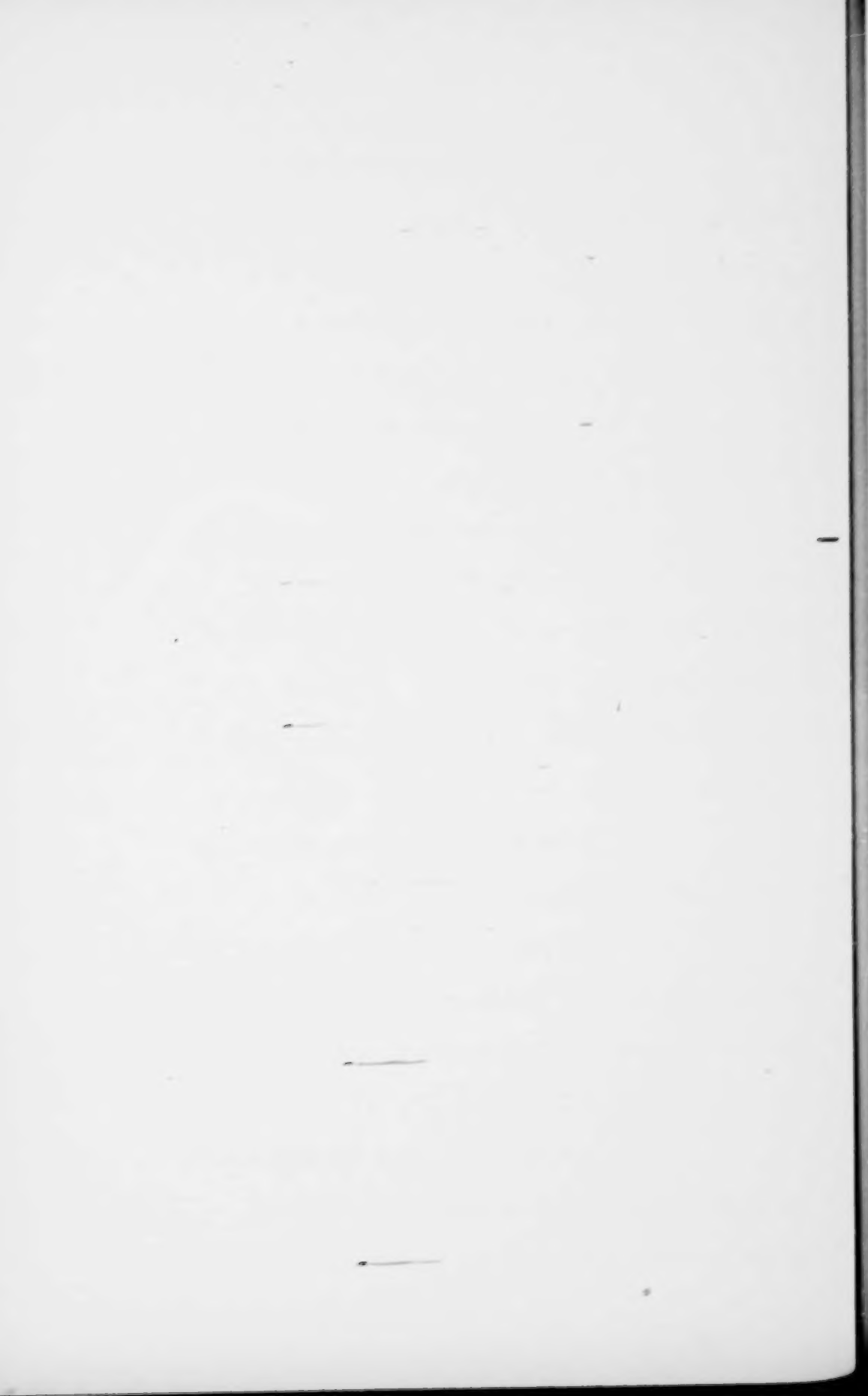
76. the Order of this Court, dated April 29, 1977;

77. the decision of Surrogate Bennett withdrawing decision, dated April 29, 1977 and directing counsel to appear May 25, 1977 to show cause why the Court should not proceed without further delay, dated May 2, 1977;

78. the decision of this Court, dated August 24, 1977;

79. the decision of Surrogate Bennett setting October 4, 1977, as date for commencing of examinations before trial, dated September 29, 1977;

80. the decision of Surrogate Bennett directing counsel to submit briefs with respect to decedent's



alleged syphoning funds, dated  
September 29, 1977;

81. the decision of Surrogate  
Bennett to sign Order of Albert J.  
Fiorella, attorney for defendants, see  
September 29, 1977 decisions, dated  
October 19, 1977;

82. the reply brief of  
Stephen Hochhauser to defendant's brief  
as basis of liability, dated December 6,  
1977;

83. the plaintiff's notice of  
motion, dated January 6, 1978, seeking  
production, discovery and inspection of  
certain documents;

84. the plaintiff's notice of  
motion for discovery and inspection,  
dated January 6, 1978;

85. the cross-motion of the  
defendants, Reed, Hackell, Potter, First  
National City Bank, Werner, Dadgab,  
Brimsco, Simon Cohen Real Estate and





Management Company, Simon Cohen Realty Company and Aljer Realty Company, dated January 30, 1978;

86. the closing affidavit of Feinerman, et al., to plaintiff's motion for discovery and inspection, dated January 31, 1978;

87. the affidavit of Stephen Hochhauser in opposition to defendants' cross-motion for adjournment of plaintiff's motion for discovery, dated February 10, 1978;

88. the reply affidavit of Robert W. Corcoran, regarding defendants' cross-motion, dated February 13, 1978;

89. the decision of this Court, dated March 2, 1978;

90. the affidavit of Robert J. Reed, requesting Court to commence subject discovery proceeding not earlier



than August 1, 1978, dated March 16,  
1978;

91. the affidavit of Stephen  
Hochhauser requesting discovery and  
inspection to proceed forthwith, dated  
March 20, 1978;

92. the decision of this  
Court, dated April 4, 1978;

93. the discovery proceedings  
conducted in this Court on April 18,  
1978; April 21, 1978 and May 3, 1978,  
and upon all of the documents and  
instruments produced in the course  
thereof;

94. the decision of Surrogate  
Bennett directing Albert J. Fiorella to  
submit documents within one month, dated  
May 18, 1978;

95. the plaintiff's amended  
and supplemental bill of particulars,  
dated July 9, 1978;



96. the defendants' discovery notice with respect to documents in possession of plaintiff, dated July 14, 1978;

97. the plaintiff's notice of motion and supporting affidavit of Hochhauser for a Protective Order relating to certain items of discovery, dated July 17, 1978;

98. the plaintiff's amended and supplemental bill of particulars, dated July 26, 1978;

99. the defendants' notice of cross-motion and supporting affirmation of Robert W. Corcoran in opposition to plaintiff's motion for Protective Order with respect to defendants' discovery notice of July 14, 1978, dated July 31, 1978;

100. the Order of this Court, dated August 18, 1978;



101. the plaintiff's notice to admit pursuant to CPLR 3123, dated September 21, 1978;

102. the plaintiff's notice to admit, dated September 21, 1978, addressed to the defendant, Potter;

103. the Order to Show Cause, signed by Surrogate Bennett, extending defendants' time to serve responding papers under CPLR 3123, dated October 5, 1978;

104. the application of the defendants, and upon the Order of this Court, dated October 23, 1978, seeking an Order permitting the oral examination before trial of the plaintiff's attorney, Stephen Hochhauser;

105. the decision of this Court, dated October 27, 1978;

106. the affidavit of Stephen Hochhauser in opposition to motion for





deposition of counsel, dated

October 27, 1978;

107. the affidavit of Robert W. Corcoran, sworn to October 31, 1978, submitted in support of the defendants' motion to examine Stephen Hochhauser;

108. the notice of motion, dated October 31, 1978 of the defendants, Soto, Wilschek, Katz, J.S.K. and Volume Feeding, seeking an Order permitting their examination before trial of the plaintiff's attorney, Stephen Hochhauser;

109. the affidavit of Hochhauser in opposition to motions of defendants to take deposition of plaintiff's attorney and forwarding letter, dated November 3, 1978;

110. the affidavit of Murray Koven in support of motion directing the



attorney for plaintiff to submit all examinations, dated November 6, 1978;

111. the Order of this Court, dated November 13, 1978;

112. the response, dated December 1, 1978 of the defendant, Potter to plaintiff's notice to admit;

113. the response, dated December 4, 1978 of the defendants Reed, Hackell and Citibank to plaintiff's notice to admit;

114. the decision of this Court herein, dated December 13, 1978, and the decision thereof, dated December 20, 1978;

115. the plaintiff's notice of motion and supporting affidavit to permit plaintiff ready access to defendants' relevant documents, dated January 5, 1979;

116. the affidavit of Robert W. Corcoran, sworn to the 17th



day of January, 1979, submitted in opposition to the plaintiff's application for the production of additional documents;

117. the affidavit of Stephen Hochhauser with corrections and additions to the deposition transcripts, sworn to February 16, 1979;

118. the decision of this Court, dated February 28, 1979;

119. the note of issue and statement of readiness herein filed by the plaintiff on or about March 5, 1979;

120. the motion of the defendants, dated March 7, 1979, and the Order of this Court, dated March 7, 1979, together with the papers attached thereto, directing that the plaintiff show cause why an Order should not be entered herein vacating and setting aside the plaintiff's note of issue and statement of readiness;



121. the affidavit of plaintiff, sworn to March 14, 1979, submitted in opposition to the defendants' motion for summary judgment;

122. the affidavit of Stephen Hochhauser in opposition to the motion to strike note of issue, sworn to March 15, 1979;

123. the notice of motion of the defendants, Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, dated March 19, 1979, together with the papers attached thereto;

124. the affirmation of Albert J. Fiorella, submitted in support of the defendants' motion for an application to set aside the note of issue and statement of readiness, dated March 20, 1979;





125. the stipulation of the parties herein entered into in this Court of March 21, 1979;

126. the decision of the Court herein, dated March 27, 1979;

127. the motion, dated March 28, 1979, of the defendants, Soto, Wilschek, Katz, J.S.K., Volume Feeding, to examine and make copies of the Federal and State Income Tax Returns of the plaintiff, together with the papers attached thereto;

128. the Order of this Court, dated March 29, 1979;

129. the affidavit of Stephen Hochhauser in opposition to the motion by defendants to inspect and copy plaintiff's income tax returns, dated April 4, 1979;

130. the supplemental affidavit of Stephen Hochhauser, sworn to the 4th day of April, 1979,



submitted by plaintiff in opposition to the defendants' motion for summary judgment;

131. the plaintiff's notice of motion, dated April 5, 1979, seeking production and examination of certain documents;

132. the affidavit of Bernd Bilstein, sworn to the 8th day of May, 1979, submitted by plaintiff in his opposition to the defendants' motion for summary judgment;

133. the affidavit of Arthur Press, sworn to the 12th day of May, 1979, submitted by plaintiff in opposition to the defendants' motion for summary judgment;

134. the transcript of the proceedings in this Court on May 16, 1979, held in connection with the defendants' motion for summary judgment;



135. the decisions of this Court, dated May 16, 1979 and May 18, 1979, made with respect to the defendants' motion of March 28, 1979;

136. the second supplemental affidavit of Robert Cohen opposing the motion for summary judgment, dated June 11, 1979;

137. the affidavit of Judith Feinerman, sworn to the 18th day of June, 1979, submitted in support of the defendants' motion for summary judgment;

138. the affidavit of Stephen Hochhauser re summary of plaintiff's position on the motion for summary judgment, dated June 19, 1979;

139. the affidavit of defendant Werner, submitted in support of the defendant's motion for summary judgment;

140. the affidavit of defendant Wilschek, sworn to July, 1979,



and submitted in support of defendants' motion for summary judgment;

141. the decision of Surrogate Bennett setting July 23, 1979 as final date to submit memoranda in connection with said motions, dated July 12, 1979:

142. the affidavit of defendant Hackell, duly sworn to July 23, 1979, and submitted in support of defendants' motion for summary judgment;

143. the affidavit of defendant Potter, sworn to July 23, 1979, submitted in support of defendants' motion for summary judgment;

144. the affirmation of Albert J. Fiorella, dated July 23, 1979, submitted in support of defendants' motion for summary judgment;

145. the affidavit of defendant Katz, sworn to July 23, 1979,





submitted in support of defendants' motion for summary judgment;

146. the reply affidavit of Stephen Hochhauser, sworn to July 30, 1979;

147. the reply affidavit of Sidney Hackell, sworn to August 10, 1979, submitted in support of defendants' motion for summary judgment;

148. the report of the referee herein, dated August 22, 1979;

149. the notice of motion, dated September 6, 1979, of the defendants, Fienerman and Jasdane, for an Order rejecting that part of the referee's report as recommended denial of the defendants' motion for summary judgment, and for a further Order granting summary judgment in favor of the defendants' dismissing the tenth cause of action of the amended and



supplemental complaint, together with the supporting papers attached thereto;

150. the notice of motion, dated September 11, 1979 of the defendants Reed, Hackell, Potter, First National City Bank, Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company, Aljer Realty Company, for an Order disaffirming and rejecting that report of the referee, dated August 22, 1979, which denied the defendants' motion for summary judgment;

151. the notice of motion, dated September 11, 1979, made by defendants, Soto, Wilschek, J.S.K., Katz, Volume Feeding, for an Order disaffirming and rejecting the report of the official referee, dated August 22, 1979;

152. the affidavit of Stephen Hochhauser in opposition to the motions



re reject the Referee's report, dated September 17, 1979;

153. the decision of the Court, dated November 28, 1979, affirming the recommendations of the official referee with respect to disposition of the defendants' motion for summary judgment;

154. the decision of the Court, dated December 19, 1979, with respect to the Order to be signed by the Court on its decision of November 28, 1979;

155. the Order of this Court, dated December 19, 1979, denying the defendants' motion to reject the referee's report, dated August 22, 1979, and confirming the same;

156. the Order of this Court, dated January 11, 1980, resettling the Court's Order of December 19, 1979;



157. the Order of this Court,  
dated January 28, 1980;

158. the application of the  
defendants, Soto, Wilschek, J.S.K., Katz  
and Volume Feeding, dated February 7,  
1980, seeking an Order staying the  
trial of this action pending an appeal  
from the Order of this Court denying the  
application of those defendants for  
dismissal of the tenth cause of action;

159. the application of the  
defendants, Fienerman and Jasdane,  
brought on by Order to Show Cause in the  
Appellate Division, Second Judicial  
Department, dated February 13, 1980,  
seeking a stay of the trial pending the  
appeal of those defendants from the  
Orders of this Court, dated December 19,  
1979, January 11, 1980 and January 28,  
1980;

160. the defendants' Robert J.  
Reed, et. al., notice of appeal from





part of an Order entered on January 28, 1980, dated February 7, 1980;

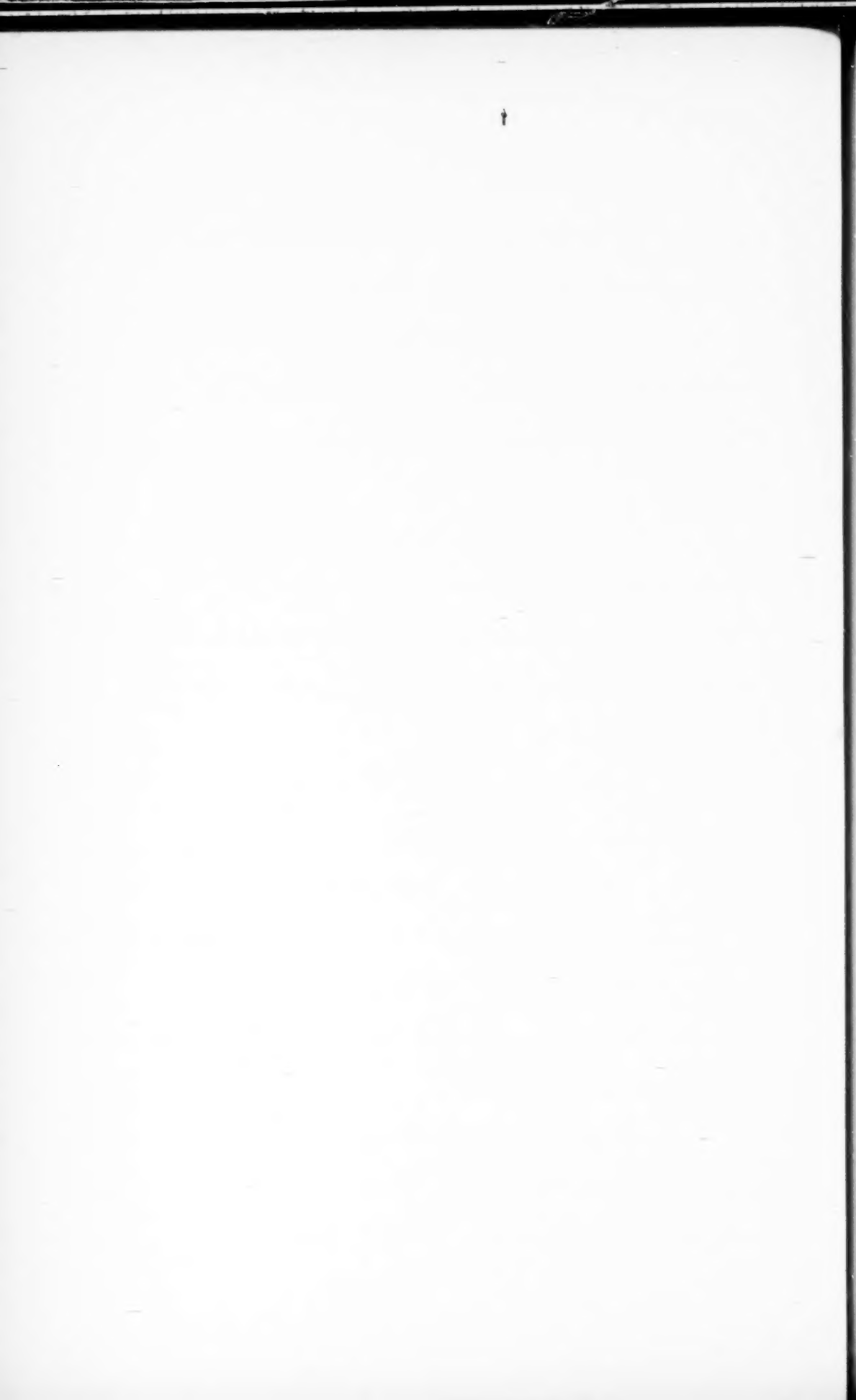
161. the affidavit of Stephen Hochhauser in opposition to motion for a stay pending appeal, dated February 13, 1980;

162. the notice of appeal and pre-argument statement of defendants, Soto, et. al., from part of a resettled Order entered on January 28, 1980, dated February 22, 1980;

163. the decision of this Court, dated April 2, 1980;

164. the transcripts of the oral pre-trial examinations of Robert Cohen, conducted during the period July 6, 1972 through and including September 20, 1978;

165. the transcripts of the oral depositions before trial of Stephen Hochhauser, conducted during the period



from January 8, 1979 through and including April 4, 1979;

166. the transcripts of the oral examinations before trial of defendant, Judah Fienerman, conducted on May 16, 1977 and October 25, 1977;

167. the transcripts of the oral examinations before trial of defendant, Juan Soto, conducted on May 9, 1977 and November 28, 1977;

168. the transcript of the oral examination before trial of defendant, Dr. William E.F. Werner, conducted on October 25, 1973;

169. the transcript of the oral examination before trial of defendant, Beatrice Potter, conducted on September 25, 1973;

170. the transcript of the oral examination before trial of Henry McKenize, conducted on September 25, 1973;



171. the transcripts of the oral examinations before trial of defendant, Sheldon Katz, conducted on May 6, 1977 and November 17, 1977;

172. the transcripts of the oral examinations before trial of defendant, Robert J. Reed, conducted on December 13, 1972, December 20, 1972, January 12, 1973, February 8, 1973, March 29, 1973, May 10, 1977.

173. the transcripts of the oral examinations before trial of defendant, Sidney Hackell, conducted on September 25, 1973 (amended by deponent's amending affidavit), May 2, 1977, May 3, 1977, May 4, 1977, May 27, 1977, June 13, 1977, October 4, 1977 and November 17, 1977;

174. the transcripts of the trial of the action conducted in this Court on various days during the period



commencing March 4, 1980 and ending  
October 22, 1981;

175. the Order to Show Cause,  
dated March 30, 1982, and the affidavit  
of Robert Cohen, duly sworn to March 26,  
1982, in support thereof;

176. the notice of cross-  
motion of Robert V. Shannon, dated  
April 20, 1982, and the supporting  
affidavit of Robert V. Shannon, duly  
sworn to on April 21, 1982;

177. the notice of cross-  
motion for advice and direction of  
Stephen Hochhauser, dated April 21,  
1982, and the affirmation of Stephen  
Hochhauser, dated April 21, 1982, in  
support thereof;

178. the affidavit of  
Robert W. Corcoran, duly sworn to on  
April 26, 1982, submitted in connection  
with the application of plaintiff for  
substitution of attorneys;





179. the affirmation of Morris Rochman, dated April 30, 1982, submitted in connection with the plaintiff's Order to Show Cause, dated March 30, 1982;

180. the affidavit of Robert Cohen in reply and in opposition to Hochhauser's cross-motion for advice and direction, duly sworn to May 1, 1982;

181. the affidavit of Robert W. Corcoran, duly sworn to May 7, 1982, submitted in response to the affirmation of Morris Rochman, dated April 30, 1982;

182. the affirmation of Morris Rochman, dated May 10, 1982, replying to the affidavit of Robert W. Corcoran, sworn to May 7, 1982;

183. the decision of the Court, dated August 2, 1982;

184. the notice of motion made by Morris Rochman, dated August 16, 1982



and his supporting affirmation, dated August 16, 1982;

185. the Order of the Court, entered August 17, 1982;

186. the Order of this Court, signed by Surrogate Radigan re hearing of October 4, 1982, dated August 23, 1982;

187. the notice of appeal and pre-argument statement by Robert Cohen, dated September 15, 1982;

188. the Order to Show Cause, dated September 21, 1982 and affidavit of plaintiff, Robert Cohen, sworn to September 20, 1982 in support thereof;

189. the affidavit of Stephen Hochhauser, sworn to September 21, 1982;

190. the notice of Surrogate Radigan to all counsel re rulings at scheduled hearing of October 4, 1982, dated September 21, 1982;



191. the reply affirmation of Michael E. Schoeman, dated September 23, 1982;

192. the affirmation of Michael E. Schoeman, dated September 24, 1982, submitted in connection with Morris Rochman's notice of motion, dated September 14, 1982;

193. the affirmation in opposition of Stephen Hochhauser, dated September 24, 1982;

194. the affidavit in opposition of Murray T. Koven, sworn to September 24, 1982;

195. the affidavit in opposition of Robert W. Corcoran, sworn to September 28, 1982;

196. the affirmation of Morris Rochman, dated September 28, 1982;

197. the letter of Robert W. Corcoran to Stephen Hochhauser re



corrections to affidavit, dated  
September 29, 1982;

198. the decision of the  
Surrogate, dated October 1, 1982, in  
connection with the motion by the  
plaintiff for an Order directing that  
the Court be disqualified;

199. the Order of the Court,  
dated October 1, 1982;

200. the offer of the  
defendants to settle this action upon  
the terms contained in the proposed  
stipulation submitted to the Court in  
October, 1982;

201. the offer of settlement  
of plaintiff, Robert Cohen, dated  
October 4, 1982;

202. the affidavit of Stephen  
Hochhauser in opposition to motion for  
stay and in support of cross-motion for  
injunction, pendente lite, dated  
October 6, 1982;





203. the answering affirmation  
of Michael E. Schoeman, dated  
October 11, 1982;

204. the notice of motion of  
Michael E. Schoeman re substitution of  
attorneys for plaintiffs, dated  
December 17, 1982;

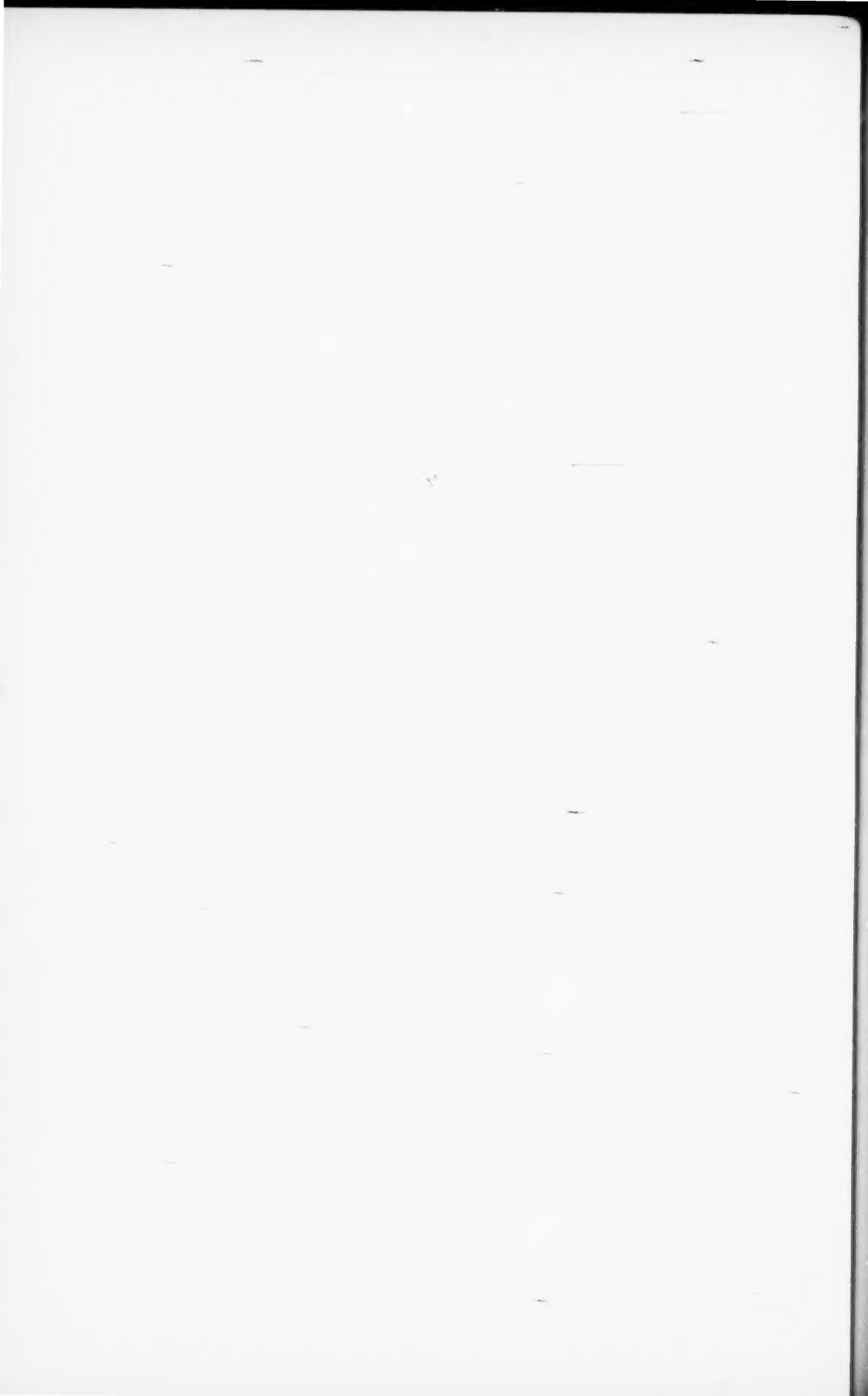
205. the affirmation of  
Stephen Hochhauser in opposition to  
motion by Robert Cohen, dated  
December 24, 1982;

206. the affidavit of  
Michael E. Schoeman in reply to Stephen  
Hochhauser's affidavit, dated  
December 29, 1982;

207. the notice of settlement  
offer to partners, dated January 13,  
1983, prepared and mailed by the Court;

208. the decision of the  
Court, dated January 18, 1983;

209. the decision of Surrogate  
Radigan re motion to compel and settle



Order on five-days' notice, dated  
January 24, 1983;

210. the Order of the Court,  
entered February 25, 1983;

211. the decision of Surrogate  
Radigan re turnover of books, documents,  
computer files, dated March 7, 1983;

212. the Order of the Court,  
entered March 9, 1983;

213. the decision of the  
Court, dated April 6, 1983;

214. the affirmation of  
Michael E. Schoeman, dated April 7,  
1983, opposing the proposed retention by  
Morris Rochman of Stephen Hochhauser,  
and in connection with Morris Rochman's  
application for permission to obtain an  
accountant;

215. the reply affirmation of  
Morris Rochman, dated April 12, 1983, in  
connection with his application for  
permission to retain an accountant and



to engage the services of Stephen  
Hochhauser;

216. the reply affirmation of  
Morris Rochman, dated April 12, 1983;

217. the plaintiff's  
affidavit, sworn to May 20, 1983, in  
opposition to defendants' settlement  
proposal;

218. the affirmation of  
Michael E. Schoeman, dated June 1, 1983,  
in opposition to defendants' settlement  
proposal;

219. the affidavit of  
Robert J. Reed, sworn to June 2, 1983,  
in response to plaintiff's affidavit in  
opposition to defendants' settlement  
proposal;

220. the Court's decision of  
June 22, 1983;

221. the consent of the  
defendants, Robert J. Reed, Sidney  
Hackell, Beatrice Potter, First



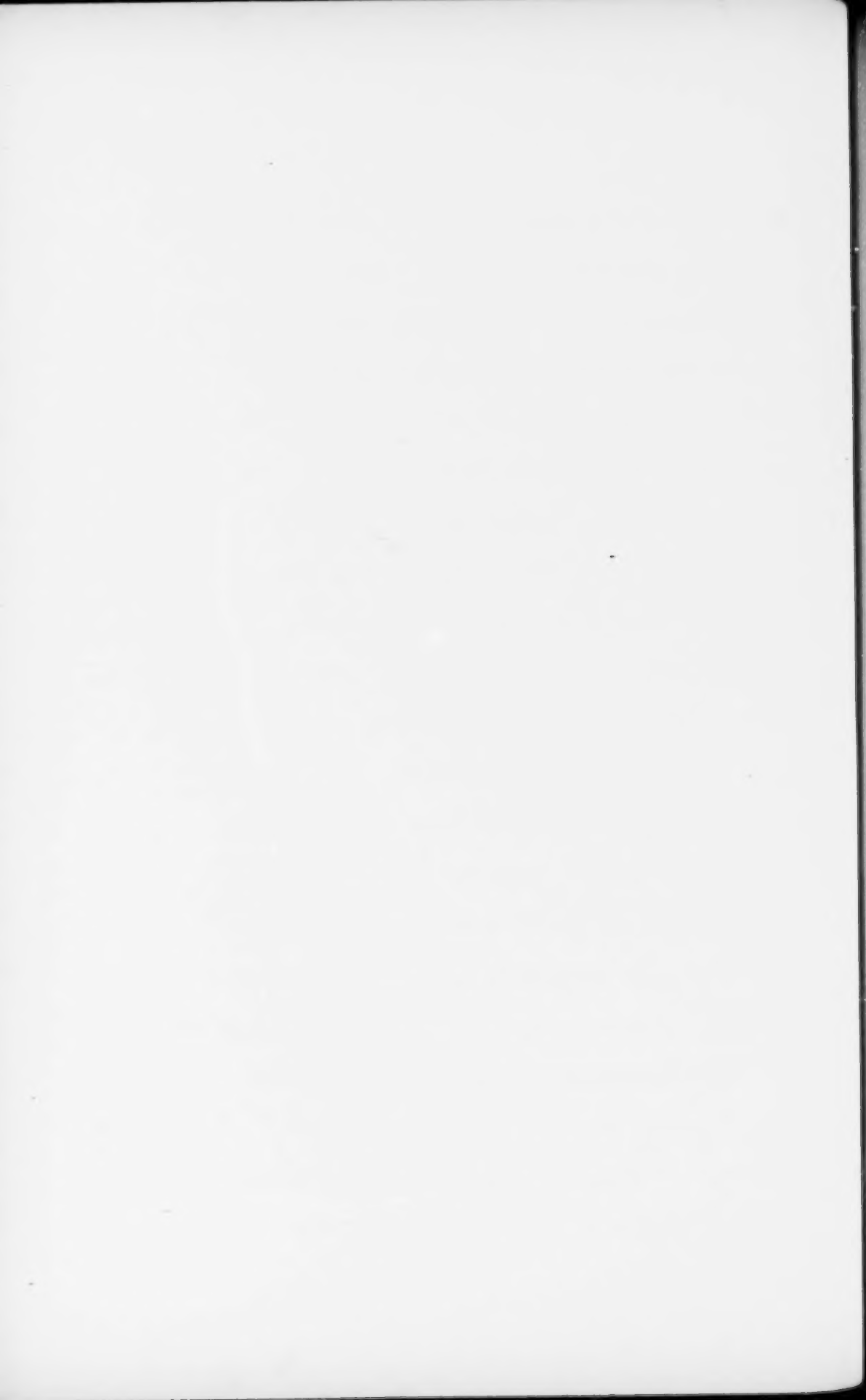
National City Bank, Dr. William E.F. Werner, Dadgab, Brimsco, Simon Cohen Real Estate and Management Company, Simon Cohen Realty Company and Aljer, and their acceptance of those conditions of settlement specified in the decision of this Court, dated June, 1983;

222. the response to the Court's decision of June 22, 1983 of defendants, Judah Feinerman and Jasdane, Inc., dated July 11, 1983;

223. the consent of the defendants', Soto, Wilschek, J.S.K., Katz and Volume Feeding, with the conditions of settlement specified in the Court's decision of June 22, 1983;

224. the defendant's consent to modification of settlement offer, dated July 13, 1983;

225. the affidavit of Robert Cohen, sworn to July 20, 1983, in





response to Surrogate's decision, dated June 22, 1983;

226. the affirmation of Michael E. Schoeman, dated July 22, 1983, in response to the Court's decision of July 22, 1983;

227. the affidavit of Robert W. Corcoran, sworn to July 25, 1983;

228. the decision of Surrogate Radigan not to submit Order, dated July 28, 1983;

229. the responses received from the partners;

230. the Order of the Court, entered August 9, 1983;

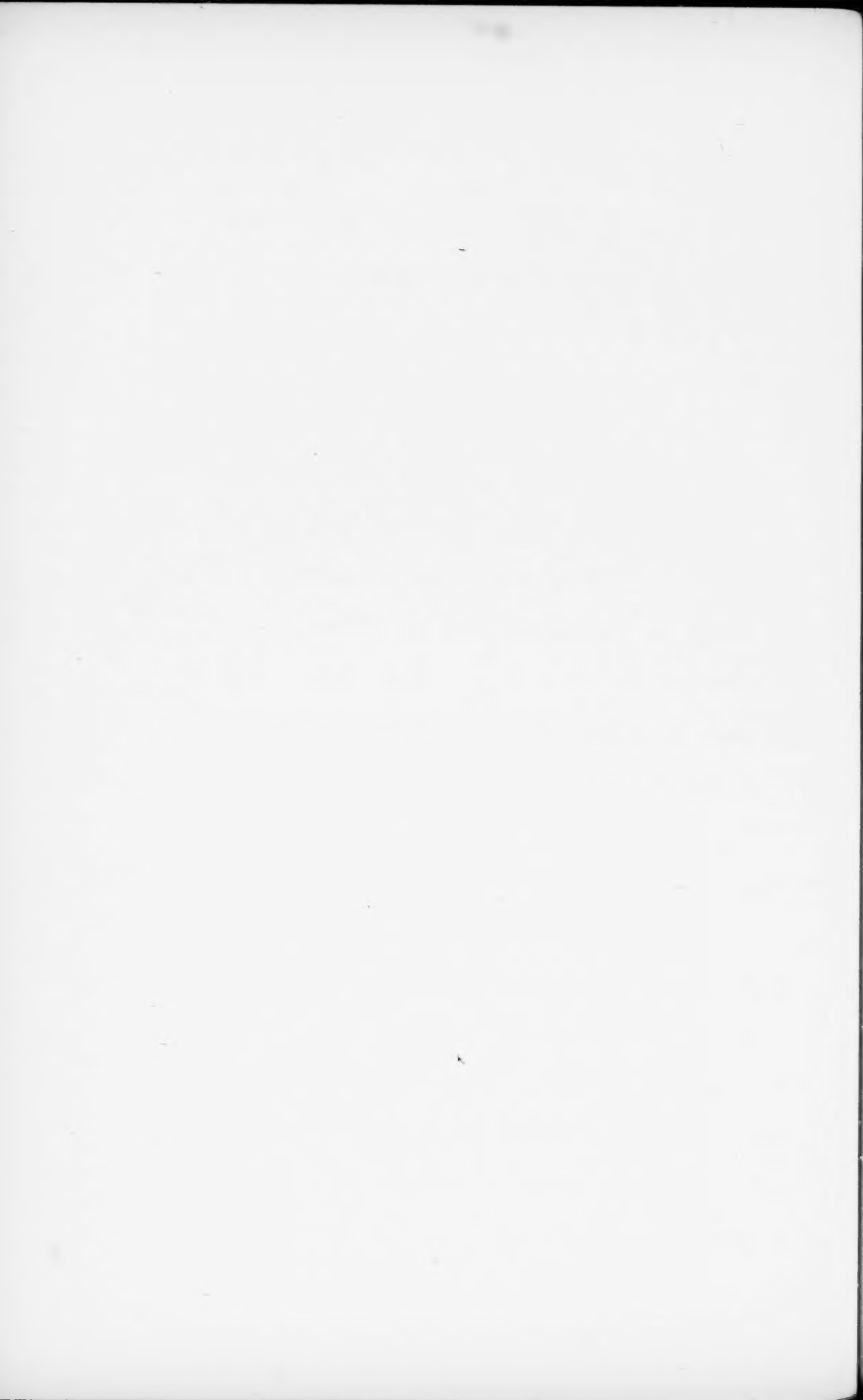
231. the plaintiff's notice of motion, dated September 1, 1983, seeking an Order modifying or resettling the Court's Order of August 9, 1983, together with the supporting affidavit or affirmation of Michael E. Schoeman, dated September 1, 1983;



232. the notice of motion of plaintiff, Robert Cohen, dated September 1, 1983, for an Order modifying or resettling the Court's Order of August 9, 1983, and affirmation of Michael E. Schoeman, dated September 1, 1983 in support thereof;

233. the notice of motion of Michael E. Schoeman for an Order modifying or resettling the Order, dated August 9, 1983, with affirmation of Michael E. Schoeman and Order of Surrogate Radigan attached, dated September, 1983.

234. the plaintiff's notice of motion and supporting affidavit of Michael E. Schoeman, both dated September 6, 1983, seeking an Order directing the Clerk of Court to prepare and transmit certain papers to plaintiff.



235. the Order to Show Cause, dated September 8, 1983 for re-argument and resettlement of the Court's Order, entered August 9, 1983 and affidavit of Robert W. Corcoran, sworn to September 8, 1983 in support thereof;

236. the affirmation of Michael E. Schoeman, dated September 16, 1983, in opposition to motion to modify and resettle Order;

237. the affidavit of Robert W. Corcoran, sworn to September 20, 1983, in response to affirmation of Michael E. Schoeman, dated September 16, 1983;

238. the decision of this Court, dated December 2, 1983, denying plaintiff's motion for an Order directing the Court to photocopy pleadings, answers, motions and responses to motions for the plaintiff;



239. the plaintiff's notice of motion, dated December 9, 1983, and supporting affirmation of Michael E. Schoeman, seeking modification or resettlement of the Court's Order of August 9, 1983;

240. the affidavit of Robert W. Corcoran, sworn to December 21, 1983, in further support to motion to reargue and resettle;

241. the decision of this Court, dated January 6, 1984, denying as moot the plaintiff's motion for an Order compelling this Court to render a decision on the plaintiff's motion to resettle the Order of August 9, 1983;

242. the decision of this Court, dated January 6, 1984;

243. the plaintiff's notice of motion for a new trial, dated January 31, 1984, and affidavit of





plaintiff, Robert Cohen, sworn to  
January 30, 1984, in support thereof;

244. the stipulation of  
acceptance of terms of proposed  
settlement of defendants, Volume  
Feeding, Sheldon Katz, J.S.K. Cleaning,  
Juan Soto and Elaine Wilschek, dated  
January 25, 1984;

245. the plaintiff's refusal  
to accept the defendants' said proposal  
of settlement;

246. the defendants'  
acceptance, dated February 8, 1984 of  
three conditions of settlement referred  
to in this Court's Order, entered  
August 9, 1983 and this Court's  
decision, dated January 6, 1984;

247. the affirmation of Steven  
Louros, dated February 9, 1984, in  
opposition to motion for a new trial;



248. the affirmation of Lubell & Koven in opposition to motion for a new trial, dated February 9, 1984;

249. the affidavit of Robert J. Reed in opposition to plaintiff's motion for a new trial, dated February 10, 1984;

250. the affirmation of Albert J. Fiorella, dated February 14, 1984, in opposition to application for a new trial;

251. the affidavit of Robert J. Reed, sworn to February 10, 1984, in opposition to plaintiff's motion for a new trial;

252. the decision of this Court, dated April 27, 1984;

253. the plaintiff's notice of motion, dated April 27, 1984, seeking an Order compelling the Surrogate to issue an Order determining the plaintiff's motion for a new trial, together with



the supporting affidavit of Michael E. Schoeman, dated April 27, 1984;

254. the affirmation of Albert J. Fiorella, opposing the plaintiff's motion for an Order directing the Surrogate to render a decision on his application for a new trial;

255. the Decision/Order of this Court, dated May 10, 1984, denying plaintiff's motion for a new trial;

256. the Order of Surrogate Radigan rejecting all proposed Orders and Counter-orders re April 27, 1984 decision;

257. the Order of this Court, dated July 23, 1984, denying plaintiff's motion for a new trial;

258. the transcript of the trial conducted herein, and the evidence introduced in the course thereof; and



upon all of the pleadings and proceedings heretofore had herein; it is

ORDERED, ADJUDGED AND DECREED, that the above-entitled action, other than the plaintiff's seventeenth cause of action, is settled and discontinued with prejudice; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the Estate of Simon Cohen shall pay as its contribution to such settlement, and as discharge of all of its obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of Three Hundred Eighteen Thousand Four Hundred Twenty-Seven and 00/100 (\$318,427.00) Dollars; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the executors of the Estate of Simon Cohen shall, collectively, pay, as their contributions to said settlement, and as discharge of all of their





obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars; said payment to be made upon their receipt of executor's commissions from the Estate of Simon Cohen in the same amount, to wit, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars; and, it is, further

ORDERED, ADJUDGED AND DECREED, that there shall forthwith be paid collectively to the executors on account of their commissions as executors of the Estate of Simon Cohen, the sum of One Hundred Twenty-five Thousand and 00/100 (\$125,000.00) Dollars.  
and, it is, further

ORDERED, ADJUDGED AND DECREED, that the following named defendants shall collectively pay as their



contributions to said settlement, and as discharge of all of their obligations for any attorney's fees and expenses which may be allowed to plaintiff, the sum of Seventy-five Thousand and 00/100 (\$75,000.00) Dollars:

- (a) Juan Soto and J.S.K.  
Cleaning Services, Inc.
- (b) Sheldon Katz and Volume  
Feeding, Inc.
- (c) Judah Feinerman and  
Jasdane, Inc.
- (d) William B.F. Werner  
d/b/a Mid-Island Hospital

and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that the aforesaid total of Five Hundred Eighteen Thousand Four Hundred Twenty-seven and 00/100 (\$518,427.00) Dollars, when paid by the defendants as above directed, shall be distributed as follows:

- (a) to Simon Cohen  
Company \$ 18,427.00
- (b) to Simon Cohen



Realty Company and to Simon Cohen Real Estate and Management Company	\$500,000.00
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and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that defendants, Reed, Potter and the  
Estate of Simon Cohen, shall not share  
in any of the monies paid to Simon Cohen  
Real Estate and Management Company or  
Simon Cohen Realty Company as above  
provided; and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that defendants Reed, Hackell, Potter  
and Citibank, upon approval of their  
accounting as trustees of the trust for  
Robert Cohen established under the Last  
Will and Testament of Simon Cohen, shall  
resign as trustees thereof; and, it is,  
further

ORDERED, ADJUDGED AND DECREED,  
that a hearing will be held by the Court



on the 4th day of February, 1985, 9:30 A.M. to determine what portion of the aforesaid Five Hundred Thousand and 00/100 (\$500,000.00) Dollars shall be allotted to Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and what portion thereof, if any, shall be allotted to the payment of attorney's fees for services rendered to the partnerships and, what, if any, reimbursement should be made to the representative plaintiff for attorneys fees and expenses paid on behalf of the partnerships; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the defendants, Citibank and Hackell, upon their final accounting as executors of the Estate of Simon Cohen, and their concurrent accounting as trustees of the trusts established thereunder, and upon approval of such





accountings, shall resign as trustees of all of the trusts of which they are named trustees; and, it is, further

ORDERED, ADJUDGED AND DECREED, that where appropriate under the provisions of the Last Will and Testament of decedent Simon Cohen, the Surrogate will designate replacement trustees; and, it is, further

ORDERED, ADJUDGED AND DECREED, that an appropriate instrument dissolving the partnership known as Simon Cohen Company shall be executed by all the partners thereof, and shall be duly filed. In the event that any partner fails or neglects to execute such dissolution instrument, then the County Clerk of Nassau County, shall file the said certificate of cancellation; and, it is, further



ORDERED, ADJUDGED AND DECREED,  
that upon dissolution of Simon Cohen  
Company:

(a) each of the partners  
shall be deemed to have released all of  
the other partners from any and all  
obligations and liabilities arising from  
the operation of the partnership or from  
their relationship thereto as partners;

(b) upon dissolution, capital  
interest of the partners shall be as  
shown on the books of the partnership,  
as of December 31, 1970; and,

(c) all net income earned  
since January 1, 1971, shall be  
distributed equally among the partners,  
other than the Estate, in accordance  
with their capital ratio, as determined  
by the partnership agreement filed in  
the Nassau County Clerk's Office; and,  
it is, further



ORDERED, ADJUDGED AND DECREED,  
that should the plaintiff fail or refuse  
to execute and deliver to the Court the  
reconstituted partnership agreement for  
Simon Cohen Realty Company, which  
reconstituted agreement was received in  
evidence during the course of this trial  
as Plaintiff's Exhibit "18", the same  
shall be filed nonetheless by the County  
Clerk of the County of Nassau; and, it  
is, further

ORDERED, ADJUDGED AND DECREED,  
that with respect to any limited  
partnership interest in Simon Cohen  
Realty Company which is held by the  
Estate of Simon Cohen, the said Estate  
will not, in any vote or election, other  
than a vote for selection of a general  
partner, be entitled to vote its  
interest as limited partner; and, it is,  
further



ORDERED, ADJUDGED AND DECREED,  
that the monies paid by defendants',  
Reed, Hackell, Potter and Citibank, as  
above directed, for the settlement of  
this litigation shall be deemed their  
full contributions to the attorneys'  
fees expended in the defense of this  
action; and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that the status of defendant, Reed, as  
managing general partner of SCREAM, is  
hereby confirmed; and, it is, further

ORDERED, ADJUDGED AND DECREED,  
that the lease agreement between  
defendant, William B.F. Werner d/b/a  
Mid-Island Hospital, and Simon Cohen  
Real Estate and Management Company, be  
deemed amended so as to provide:

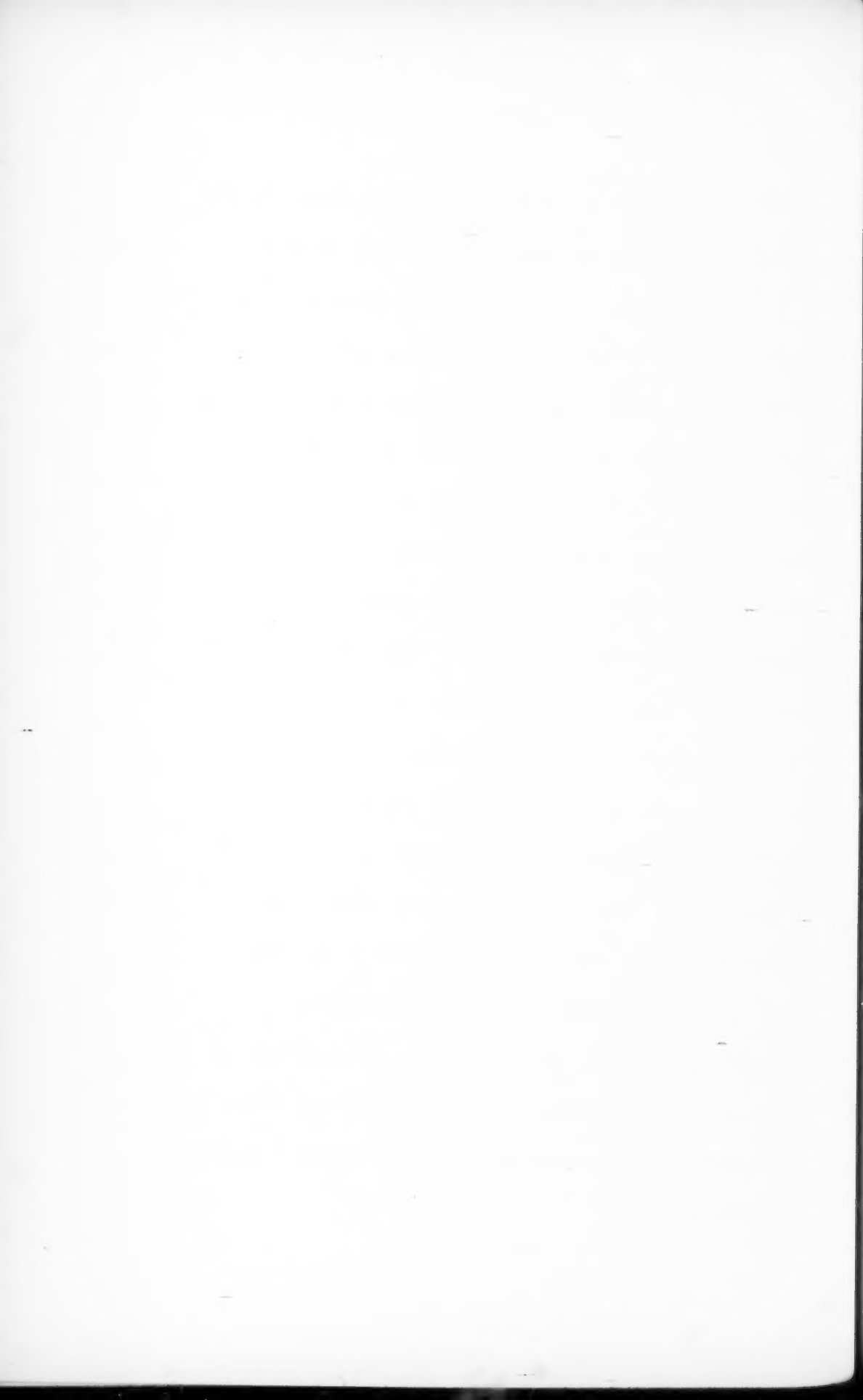
(a) the hospital shall  
make no loans to its Executive Director,  
to any member of its Board of Governors,





or to persons in the immediate family of said Director or members of the Board;

(b) all drawings of Dr. Werner, heretofore paid, are approved, and his further drawings, or that of his successor in interest, may be fixed by the hospital's Board of Governors, but shall not be increased more than ten (10%) percent in any year over the amount therefore paid in the prior year. In no event, however, shall the increase in any year exceed the increase in cost of living, using 1980 as the base year. Anything to the contrary notwithstanding, Dr. Werner shall be entitled, in addition to his drawings, for reimbursement for any amounts required to be paid by him as income or other taxes assessed by reason of his operation or ownership of the Mid-Island Hospital;



(c) the hospital shall make no contributions, except to persons or entities related to or performing services for the hospital, and justified by good business practice; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner of Simon Cohen Real Estate and Management Company, upon written request, shall be entitled to a true copy of each of the annual certified financial statements of Mid-Island Hospital; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner upon request shall be entitled to a true copy of the annual reports of the audit of the hospital by Blue Cross and/or Medicare, or any other reimbursing agency; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any partner of Simon Cohen Real Estate and Management Company, at his



own cost and expense, shall be permitted to cause an audit of the hospital's books and records for the current and any future year to be made, pursuant to terms and conditions to be agreed by the partner so requesting the same, and management of the hospital, and if they cannot agree, then on terms ordered by the Surrogate, who will retain jurisdiction to resolve any such conflicts; and, it is, further

ORDERED, ADJUDGED AND DECREED, that upon the written request of twenty-five (25%) percent of the limited partners in Simon Cohen Real Estate and Management Company an audit of the hospital's books and records for the current and any future years may be made, at the expense of Simon Cohen Real Estate and Management Company, pursuant to terms and conditions to be agreed to by the partners so requesting the same,



and management of the hospital, and if they cannot agree, then on terms ordered by the Surrogate, who will retain jurisdiction to resolve any such conflicts; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any audit conducted as hereinbefore provided, shall be carried out in a manner that will not interfere with the orderly conducted of the business of the hospital; and, it is, further

ORDERED, ADJUDGED AND DECREED, that no conduct which shall have been the subject of this litigation shall be used as the basis by any party to this litigation for denying the executors any commissions due to them upon their accounting; and, it is further

ORDERED, ADJUDGED AND DECREED, that the partners of Aljer Realty Company, Simon Cohen Realty Company and Simon Cohen Real Estate and Management





Company shall be afforded, upon their written request at reasonable times, access to the books and records of the partnerships of which they are partners; and, it is, further

ORDERED, ADJUDGED AND DECREED, that henceforth semi-annual accountings shall be prepared for Aljer Realty Company, Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and that copies thereof will be furnished to the partners of the respective partnerships; and, it is, further

ORDERED, ADJUDGED AND DECREED, that any salary or distribution by Mid-Island Hospital to William B.F. Werner, shall be disclosed; and, it is, further

ORDERED, ADJUDGED AND DECREED, that if plaintiff and defendants cannot agree as to plaintiff's status as a partner in Simon Cohen Real Estate and

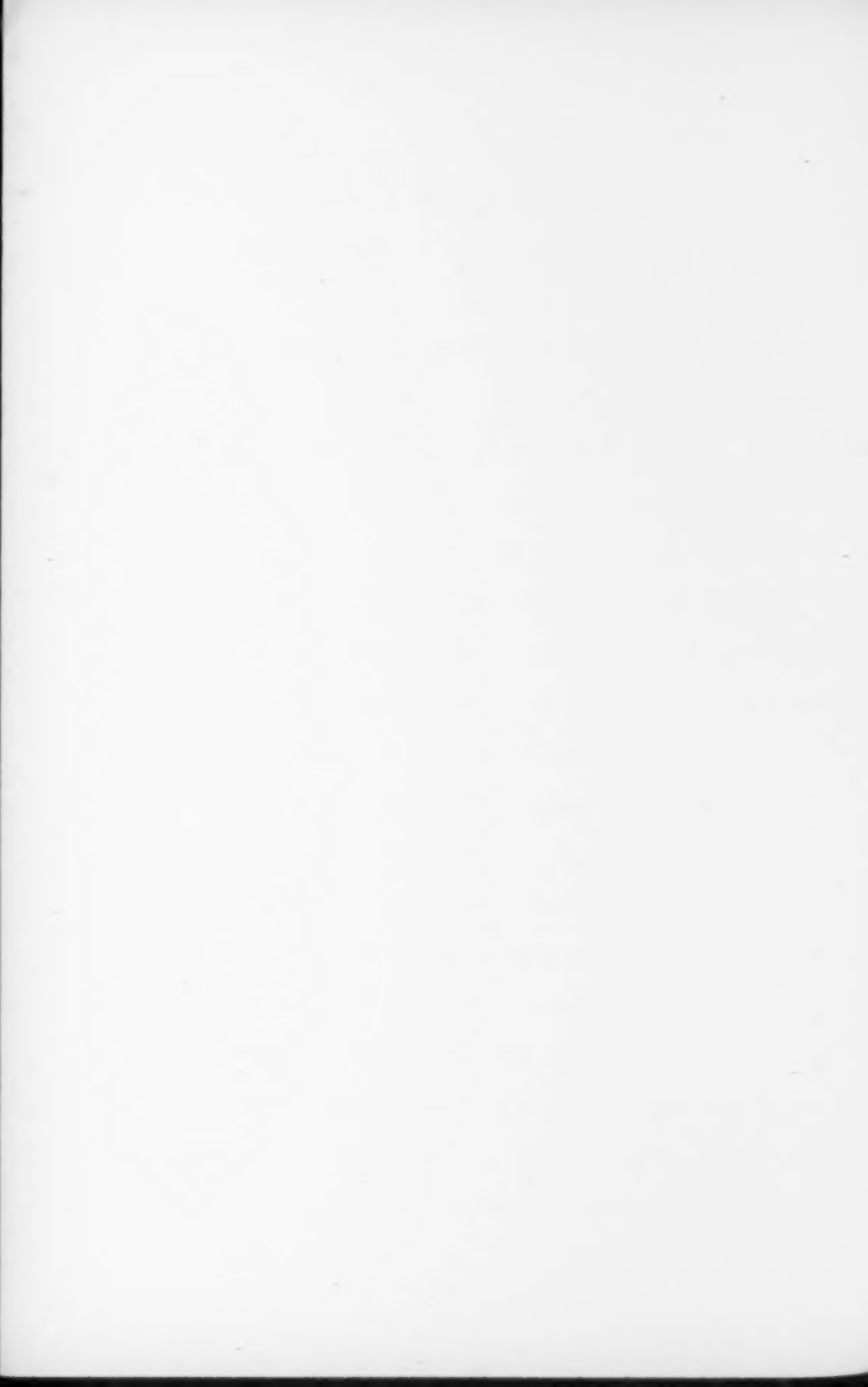


Management Company, the Court will continue to take evidence on that issue, as well as on the matter set forth under Article Seventeenth of the plaintiff's complaint; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the settlement and dismissal of this action, as above decreed, is intended to encompass all of the issues raised, or which could have been raised, in this litigation; and, it is, further

ORDERED, ADJUDGED AND DECREED, that the settlement and dismissal of this action, as above decreed, is intended to encompass all of the issues raised, or which could have been raised, in this litigation; and, it is, further

ORDERED, ADJUDGED AND DECREED, that a copy of the Court's Decision of April 27, 1984 shall be mailed to each of the partners of the plaintiff partnerships, the cost of which is to be



borne solely by the defendants, and defendants are hereby directed to deposit with the Chief Clerk of the Surrogate's Court the sum of Three Hundred and 00/100 (\$300.00) Dollars to cover the cost thereof.

Dated: Mineola, New York  
November 27, 1984.

/s/ C. Raymond Radigan  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

ROBERT COHEN, individ- : DECISION  
ually and as a partner  
of Simon Cohen Real : AD2d  
Estate Co., et al.,  
: 3666 E  
Plaintiffs- : 3666 AE  
Appellants, : A-3/24/86  
- against - :

ROBERT J. REED, et al.,:

Defendants- :  
Respondents.

-----X

Schoeman, Marsh, Updike & Welt, New  
York, N.Y. (Michael E. Schoeman and Beth  
L. Kaufman of counsel), for appellants.

Speno, Goldberg, Moore, Margules &  
Corcoran, Mineola, N.Y. (Debevoise &  
Plimpton [Robert W. Corcoran] of  
counsel), for respondents Robert Reed,  
Sidney Hackell, Citibank, Beatrice  
Potter, William B. F. Werner,  
Individually and D/B/A Mid-Island  
Hospital, Dadgab, Inc., Brimco, Inc.,  
Simon Cohen Real Estate Co. and Aljer  
Realty Co.

Albert J. Fiorella, Mineola, N.Y.  
(Edward F. Hayes III and John P. McEntee  
on the brief), for respondents Juan  
Soto, Elaine Wilscheck, J.S.K. Cleaning  
Services, Inc., Sheldon Katz and Volume  
Feeding, Inc.





In an action, inter alia, to recover damages for diversion of partnership assets, the plaintiffs appeal from (1) an order of the Surrogate's Court, Nassau County (Radigan, S.), dated July 23, 1984, which denied their motion for a new trial, (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall resume.

Order and decree affirmed.

One bill of costs is awarded to the respondents Reed, Hackell, Citibank, Potter, Werner, Dadgab, Inc., Brimsco, Inc., Simon Cohen Real Estate Co., Aljer Realty Co., Soto, Wilschek, J.S.K. Cleaning Services, Inc., Katz and



Volume Feeding, Inc., appearing separately and filing separate briefs.

The Surrogate is directed to resume the trial on the seventeen the cause of action with all convenient speed.

The instant action was commenced by the decedent Simon Cohen's son individually and as a general and limited partner, on behalf of various partnerships. The complaint essentially alleges that the decedent conspired with the individual defendants to divert assets from the partnerships, perpetrate a fraud on the partners and waste and mismanage partnership assets. In addition, the complaint charges the executors of the decedents' estate with covering up these alleged wrongdoings. The action, originally brought in the Supreme Court, Nassau County, was transferred to the Surrogate's Court,



Nassau County, by order entered December 1, 1971. After a lengthy discovery period, then Surrogate Bennett, in an order dated January 11, 1980, dismissed the first and third causes of action on the ground that they were barred by the Statute of Limitations.

A trial commenced before then Referee Radigan in March of 1980 and continued until October of the following year, at which time, although the plaintiffs had not finished presenting their direct case, it was adjourned without a date for resumption. Prior to the adjournment, the plaintiffs moved, inter alia, for leave to substitute another attorney for the attorney of record. That branch of the plaintiffs' motion which sought the substitution was granted by order dated March 9, 1983.



In the meantime, settlement negotiations were taking place, and, in October of 1982, the plaintiffs submitted a proposed settlement to Surrogate Radigan. The defendants responded by submitting a counter-proposal. At a subsequent conference, the court informed the parties that it intended to send out a notice of settlement offer to the partners, incorporating therein the terms of the counterproposal. The notice was dated January 13, 1983, and provided for responses to be sent to the court.

In its decision dated April 6, 1983, the court analyzed the responses received from the partners, most of which were favorable, and ordered a hearing to give any objectors an opportunity to show cause why the proposed settlement should not be approved. The only partner to appear at



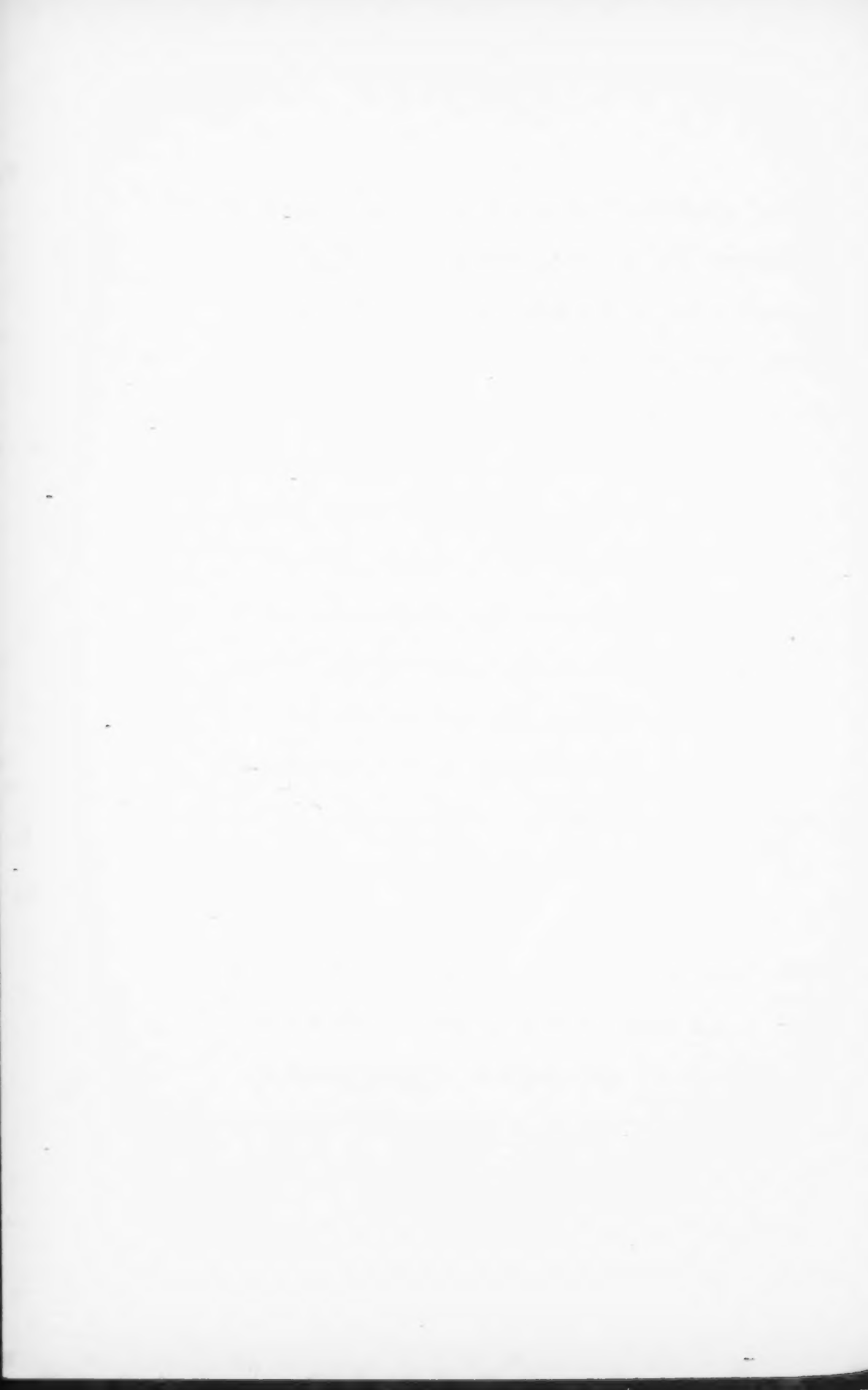


the hearing was the plaintiff Robert Cohen, who opposed the settlement proposal. Three conditions, proposed by various partners in response to the notice of settlement offer, were added to the settlement proposal with the defendants' consent, and the amended proposal was approved by the court in its decision dated April 27, 1984. The plaintiffs then moved for a new trial on the 16 causes of action asserted on behalf of the partnerships, as well as on the seventeenth cause of action, which the plaintiff Robert Cohen asserted individually, on the basis that the inordinate delay in resumption of the trial had prejudiced his due process rights. The court denied that motion by order dated July 23, 1984, holding that the issue was rendered moot by the court's approval of the settlement agreement. A settlement decree



incorporating the proposal was issued on November 27, 1984. The plaintiffs appeal from both the decree and the order denying the motion for a new trial, and we affirm.

This action was brought under partnership Law § 115-a, and thus could not be compromised or settled without the court's approval (Partnership Law § 115-a[4]). The plaintiffs contend that the court exceeded its authority in considering for its approval a proposal which was not actually the result of negotiations between the parties, but was an offer by the defendants. While the "power to approve a settlement does not translate into a power to dictate the terms of settlement (Lee v Gucker, 27 AD2d 722; Smith v Ford Motor Co., 38 AD2d 852)" (Sutherland v City of New York, 107 AD2d 568, 569, affd 66 NY2d 800), where it is apparent that no



meaningful settlement negotiations are being conducted, due in large part to the representative plaintiff's unwillingness to make certain concessions, and the court receives a settlement proposal it considers to be adequate, the court is not without authority to present the offer to the class of people being represented for their approval or disapproval, provided the notice sent to the class is fair and impartial, and does not indicate the court's views on the proposal. If the responses received from the members of that class are sufficiently favorable, the court may then consider the proposal for its approval, and hold a hearing on the fairness, reasonableness and adequacy of the same. In this case, this procedure was followed. Upon receipt of what it evidently considered to be an adequate compromise, the court



transmitted the offer to the partners, i.e., the members of the class being represented by the plaintiffs, for their approval. The court did not consider the offer as an agreement submitted for its approval until after it received favorable responses from a majority of the parties involved. In light of the indications in the record that the plaintiffs had some sort of personal stake in the outcome of the litigation that went beyond the representation of the partnerships, the Surrogate did not err in submitting the defendants' proposal to the partners over the plaintiffs' objection.

A review of the record reveals that the Surrogate was fully aware of the proper standards to be applied in evaluating a settlement, that he applied those standards in approving the settlement, and that he entertained no





improper considerations. As it cannot be said that his decision to approve the settlement was a clear abuse of discretion, that decision will not be overturned on these appeals (see, Officers for Justice v Civil Serv. Commn. of City and County of San Francisco, 688 F2d 615, cert denied sub nom. Byrd v Civil Serv. Commn., 459 US 1217; Cotton v Hinton, 559 F2d 1326; City of Detroit v Grinnell Corp., 495 F2d 448).

Since the Surrogate properly approved the settlement agreement, his denial of the plaintiffs' motion for a new trial on the causes of action which were settled and discontinued by the settlement decree was not improper. However the trial, adjourned sine die in October of 1982, should be resumed with all convenient speed insofar as it relates to the cause of action asserted



by the plaintiff Robert Cohen  
individually.

- In light of the foregoing we  
need not reach the other issues raised  
by the plaintiffs, inter alia, with  
respect to the reviewability of the  
dismissal of the third cause of action.  
We have considered the plaintiff's  
remaining contentions and find them to  
be without merit.

MANGANO, J.P., THOMPSON, NIEHOFF and  
RUBIN, JJ., concur.

May 5, 1986



APPELLATE DIVISION:  
SECOND DEPARTMENT

-----X

Robert Cohen, etc.,	:	Index No.
et al.,	:	148704
	:	
Appellants,	:	<u>ORDER</u>
v.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	
	:	

-----X

In the above entitled action, inter alia, to recover damages for diversion of partnership assets, the above named Robert Cohen, etc., et al., plaintiffs, having appealed to this court from (1) an order of the Surrogate's Court, Nassau County, dated July 23, 1984, which denied their motion for a new trial (2) a decree of the same court, dated November 27, 1984, which approved a settlement with respect to 16 of the 17 causes of action in the complaint, and provided that the trial on the seventeenth cause of action shall



resume; and the said appeals having been argued by Michael E. Schoeman, Esq., of counsel for appellants, argued by Robert W. Corcoran, Esq., and Michael H. Soroka, Esq., of counsel for respondents Robert Reed, Sidney Hackell, Citibank, Beatrice Potter, William B. F. Werner, Individually and D/B/A Mid-Island Hospital, Dadgab, Inc., Brimco, Inc., Simon Cohen Real Estate Co. and Aljer Realty Co., argued by Murray Koven, Esq., of counsel for Judah Feinerman and Jasdane, Inc., and submitted by Albert J. Fiorella, Esq., of counsel for respondents Juan Soto, Elaine Wilschek, J.S.K. Cleaning Services, Inc. Sheldon Katz and Volume Feeding, Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is





ORDERED that the decree  
appealed from are hereby unanimously  
affirmed, and it is further

ORDERED that one bill of costs  
is hereby awarded to the respondents  
Reed, Hackell, Citibank, Potter, Werner,  
Dadgab, Inc., Brimco, Inc., Simon Cohen  
Real Estate Co., Aljer Realty Co., Soto,  
Wilschek, J.S.K. Cleaning Services,  
Inc., Katz and Volume Feeding, Inc.,  
appearing separately and filing separate  
briefs, and it is further

ORDERED that the Surrogate is  
hereby directed to resume the trial on  
the seventeen cause of action with all  
convenient speed.

E N T E R

/s/  
Acting Clerk of the  
Appellate Division

[ENTERED May 5, 1986.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- :  
ually and as a Partner :  
of SIMON COHEN REAL :  
ESTATE & MANAGEMENT :  
CO., SIMON COHEN :  
REALTY CO., SIMON :  
COHEN COMPANY and :  
ALJER REALTY CO. suing :  
on behalf of himself :  
and all other partners, :  
both general and : File No. 148704  
limited, and in the :  
right and on behalf of : Dec. No. 430  
SIMON COHEN REAL ESTATE :  
SIMON COHEN COMPANY :  
and ALJER REALTY CO.,

: DECISION

Plaintiffs- :  
Appellants, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE :  
POTTER and the FIRST :  
NATIONAL CITY BANK, :  
individually and as :  
Executors of the Last :  
Will and Testament of :  
SIMON COHEN, deceased, :  
WILLIAM B.F. WERNER, :  
individually and doing :  
business as MID-ISLAND :  
HOSPITAL, JUAN SOTO, :  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES, :  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON :  
KATZ, VOLUME FEEDING, :



INC., DADGAB INC.,  
 BRIMSCO, INC., SIMON :  
 COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO. and  
 ALJER REALTY CO. :

Defendants- :  
 Respondents.

:

-----X

In this proceeding which concerned various partnerships in which the decedent had an interest, the Appellate Division has affirmed this Court's decree dated November 27, 1984. The decree approved a stipulation of settlement as to every cause of action which remained following the granting of partial summary judgment (decision dated November 28, 1979) with the exception of the seventeenth cause of action in the amended complaint which was brought by Robert Cohen individually. The Appellate Division has directed in its decision (NYLJ, May 9, 1986, p 15, col 1) that this



matter proceed with all convenient speed. Accordingly, the attorneys for all of the parties are directed to appear on Wednesday, May 14, 1986, at 9:30 a.m., for the purpose of scheduling the continuance of the trial of the seventeenth cause of action. The attorneys should be prepared to discuss at the conference the estimated time which will be required for the trial of the remaining cause of action so that the court can schedule the same on its calendar. The attorneys should be prepared to continue the trial on a date in May or June and no later.





A400

This decision constitutes an order of the court. No further order need be submitted.

Dated: May 9, 1986

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



STATE OF NEW YORK,  
COURT OF APPEALS

-----X

Robert Cohen, Individ- : ORDER  
ually &c., et al.,

Appellants, : Mo. No. 723

vs. :

Robert J. Reed, et al., :

Respondents. :

-----X

A motion for leave to appeal  
to the Court of Appeals in the above  
cause having heretofore been made upon  
the part of the appellants herein and  
papers having been submitted thereon and  
due deliberation having been thereupon  
had, it is

ORDERED, that the said motion  
be and the same hereby is dismissed upon  
the ground that the order sought to be  
appealed from does not finally determine



A402

the action within the meaning of the  
Constitution.

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED September 16, 1986.]



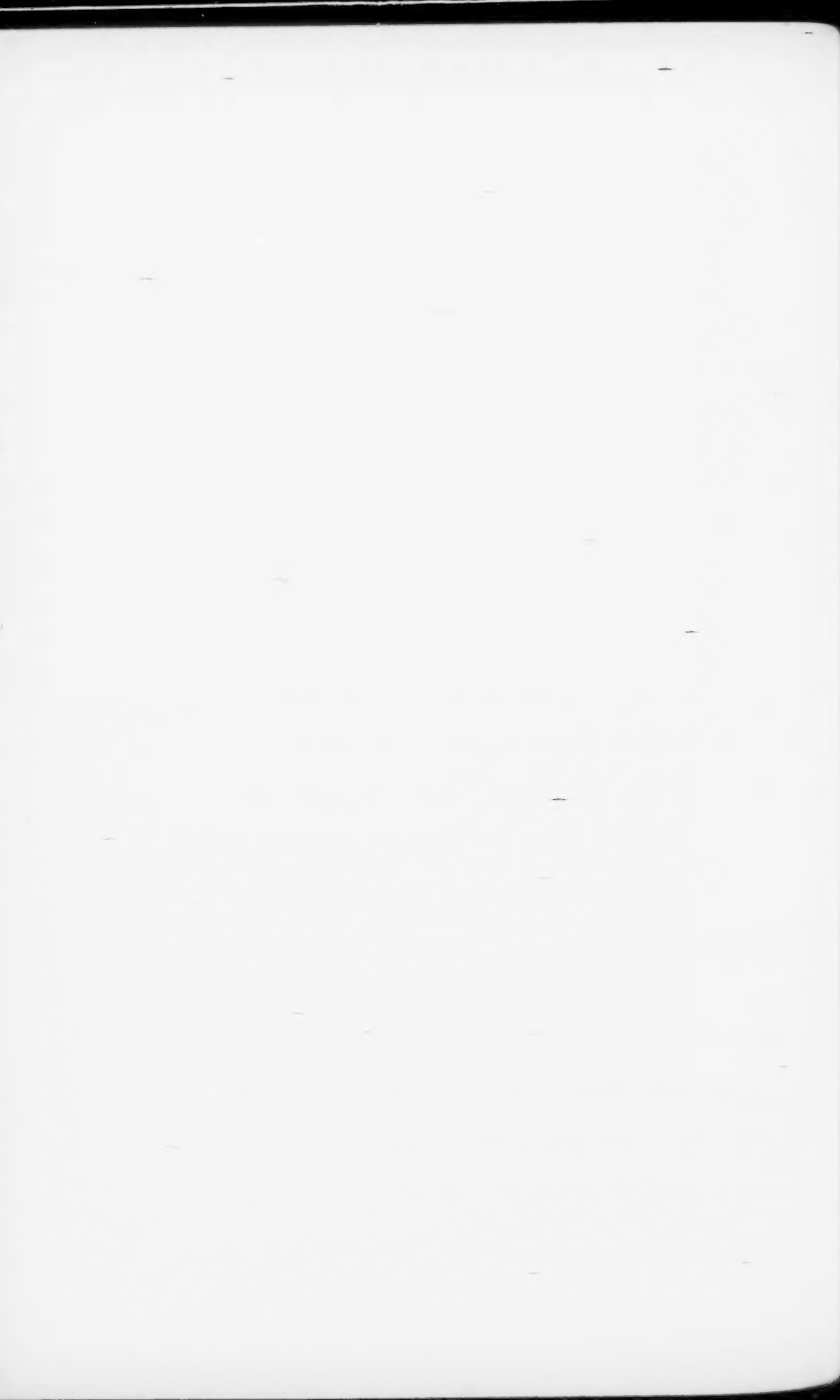
STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, &c., et	<u>ORDER</u>
al.,	:
Appellants,	2-10
	: <u>Mo. No. 414</u>
vs.	:
	:
Robert J. Reed, et al.,	:
Respondents,	:
	:
-----X	

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.





A404

/s/ Donald M. Sheraw  
Donald M. Sheraw  
Clerk of the Court

[ENTERED June 4, 1987.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Nassau County  
ually and as a partner  
of Simon Cohen Real : Index No.  
Estate and Management 148704/71  
Co., Simon Cohen Realty:  
Co., suing on behalf of ORDER OF  
himself and all other : DISMISSAL  
partners, both general WITH PREJUDICE  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

Upon the consent of plaintiff  
Robert Cohen and defendant Robert Reed,  
by their respective attorneys,  
constituting all parties interested in  
the seventeenth cause of action herein,  
it is hereby

ORDERED, that all prior  
stipulations of discontinuance as to the  
seventeenth cause of action are hereby  
vacated; and it is further



ORDERED that the seventeenth  
cause of action herein is dismissed with  
prejudice and without costs.

Dated:

/s/ C. Raymond Radigan  
Judge of the Surrogate Court

The undersigned attorneys of  
record for plaintiff Robert Cohen and  
defendant Robert Reed, respectively,  
hereby consent to entry of the above  
order.

Dated: September 16, 1987

SCHOEMAN, MARSH, UPDIKE & WELT

By: /s/

Attorneys for plaintiff  
Robert Cohen  
60 East 42nd Street  
New York, New York 10165

SPENO, GOLDBERG, MOORE,  
MARGULES & CORCORAN

By: /s/

Attorneys for defendant  
Robert Reed  
1565 Franklin Avenue  
Mineola, New York 11501





STATE OF NEW YORK,  
COURT OF APPEALS

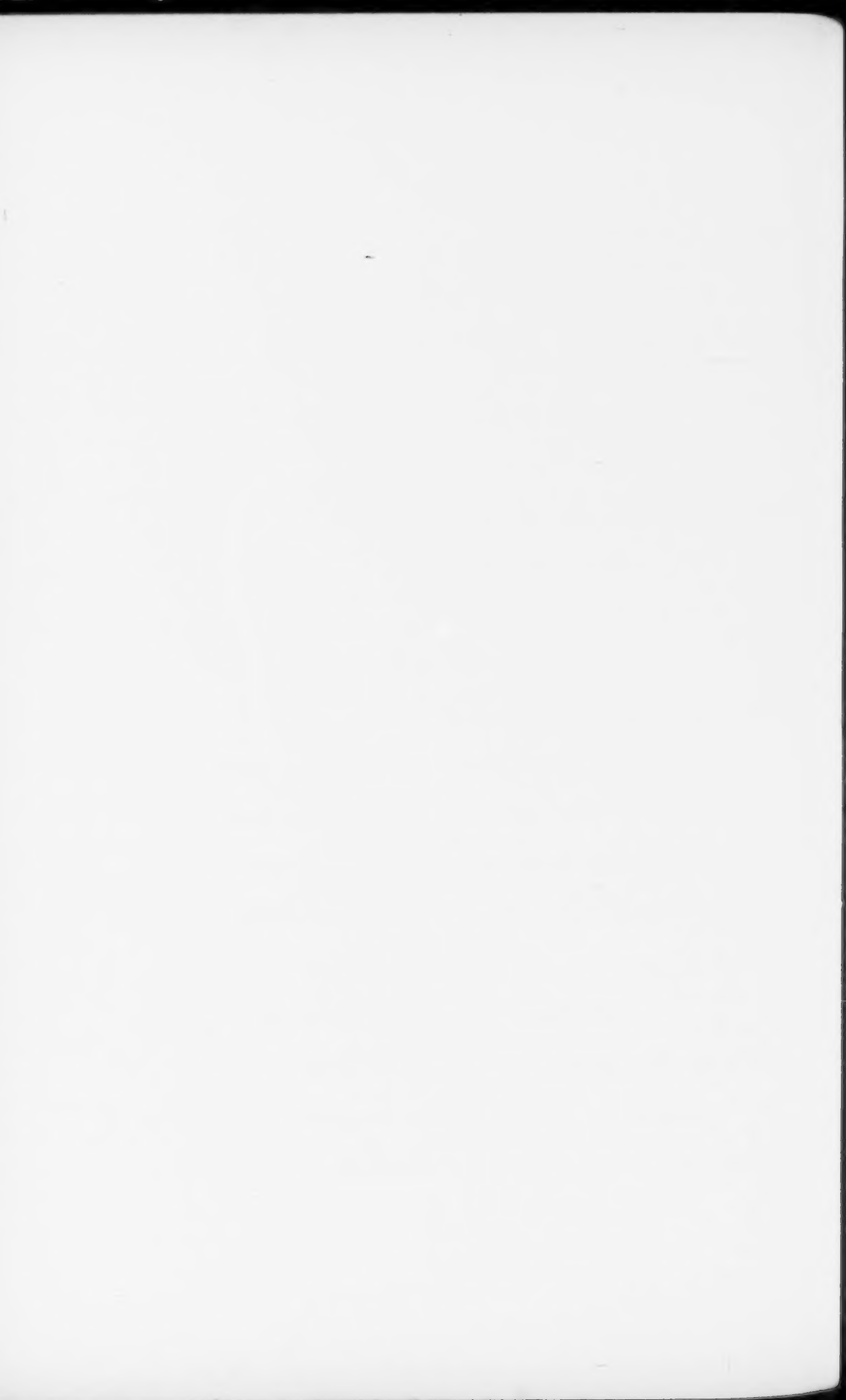
-----X

Robert Cohen, Individ-	:	<u>ORDER</u>
ually &c., et al.,	:	
	:	
Appellants,	:	Mo. No. 1211
	:	
vs.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	
	:	

-----X

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine



the proceeding within the meaning of the Constitution because further determinations by the Surrogate are required.

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED December 17, 1987.]



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File No.  
ually and as a Partner : 148704  
of Simon Cohen Real :  
Estate Co., etc., :

Plaintiff, : Dec. No.

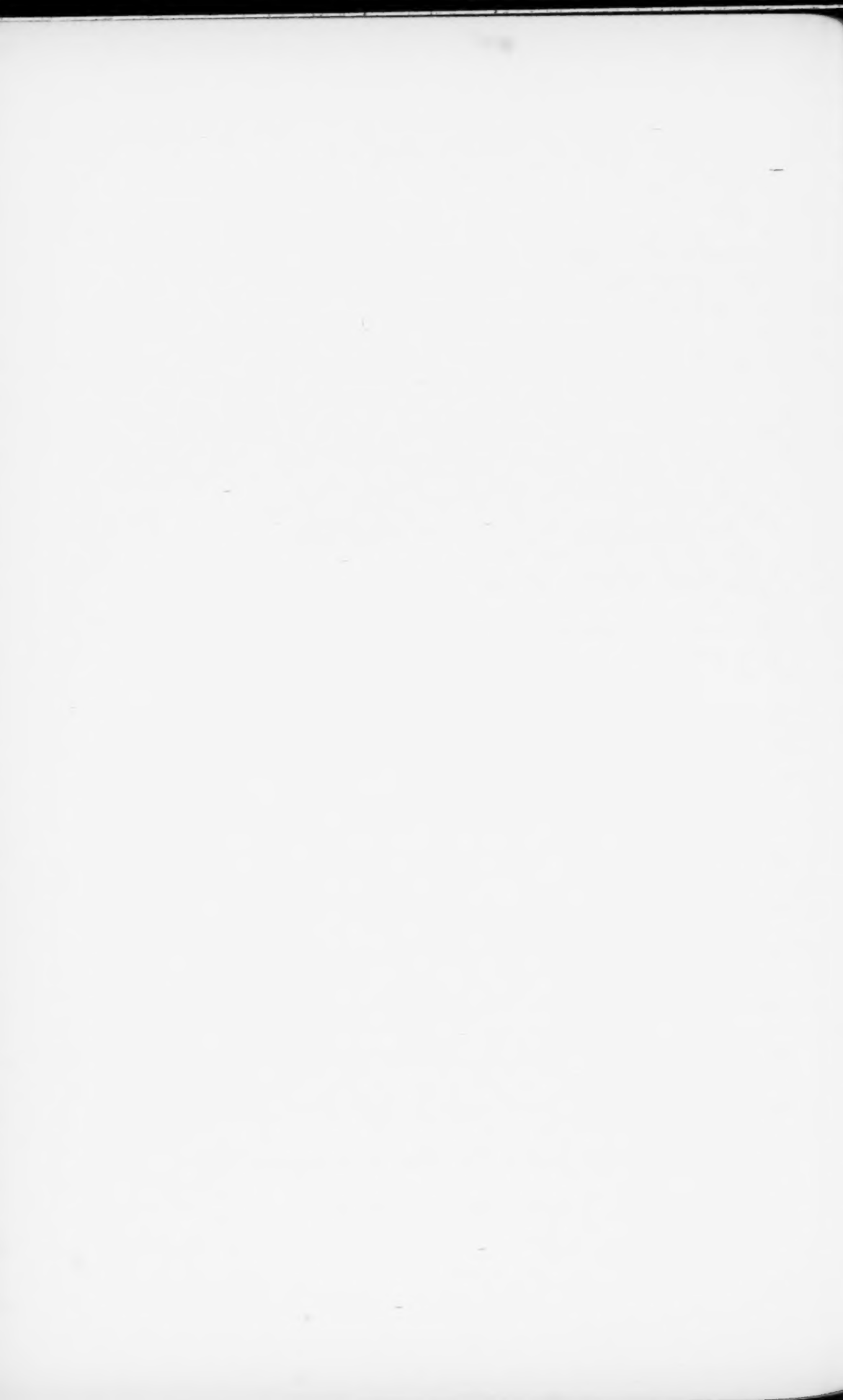
- against - : NOTICE OF  
HEARING

ROBERT J. REED, et al., :  
Defendants. :

-----X

NOTICE OF HEARING

This proceeding which was commenced by Robert Cohen, individually and on behalf of certain partnerships, was transferred from the Supreme Court, Nassau County, to the Surrogate's Court, Nassau County. By decision dated April 27, 1984, the court approved a proposed settlement of the action except for imposing condition 1E of the



proposed settlement. The decision was followed by a decree and the decree was affirmed by the Appellate Division, Second Department. An appeal was filed with the Court of Appeals. No determination has been made as to whether this appeal will be heard. This decision will not be made by the Court of Appeals until a final determination has been made by this court as to the allocation of the settlement proceeds.

The first issue presently before the court is the reimbursement of attorneys' fees and costs incurred by Robert Cohen in his representative capacity and/or payment directly to the attorneys for legal services provided to the partnerships. The question to be decided is what, if any, attorneys' fees and costs should be allowed from the





settlement proceeds, thus reducing the amounts to be distributed to the partnerships.

The second issue to be decided is the division of \$500,000 in settlement proceeds between Simon Cohen Real Estate and Management Company and Simon Cohen Realty Company.

A hearing will commence on May 31, 1988, at 9:30 a.m., in connection with the above at the Nassau County Surrogate's Court, 262 Old County Road, Mineola, New York. Anyone who wishes to be heard on this matter must appear in person or by counsel at that time. Following the hearing, the matter will be submitted for decision to



A413

the court and a copy of the decision  
will be mailed to each of the partners.

Dated: April 28, 1988.

/s/  
PEYTON BOSWELL  
Chief Clerk-Referee  
Nassau County  
Surrogate's Court



STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, Individ- : ORDER  
ually &c., et al.,

Mo. No. 62

Appellants,

vs.

Robert J. Reed, et al.,

Respondents.

-----X

A motion for reargument of  
motion for leave to appeal &c. to the  
Court of Appeals in the above cause  
having been heretofore made upon the  
part of the appellants herein and papers  
having been submitted thereon and due  
deliberation thereupon had, it is



A415

ORDERED, that the said motion  
be and the same hereby is withdrawn.

/s/

Donald M. Sheraw  
Clerk of the Court

[ENTERED May 26, 1988.]





SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	<u>DECISION</u>
ually and as a Partner	:	
of Simon Cohen Real	:	File No.
Estate Co., etc.,	:	148704/71
	:	Dec. No. 996

Plaintiff,

- against -

ROBERT J. REED, et al.,

Defendants.

-----X

-This is a hearing to determine attorneys' fees in a derivative partnership action.

The representative plaintiff seeks reimbursement from the settlement fund for fees paid by him to the attorney representing the "class" and challenges the fees on the grounds that these charges were excessive. Attorneys' fees, in addition to those already paid, are sought from the settlement fund.



At the hearing the representative plaintiff requested disclosure of one attorney's income tax returns to support his contention that there was excessive billing. This application was opposed. Tax returns are discoverable only where the information sought is unavailable from other sources (Matthews v Industrial Piping Co v Mobil Oil Corp, 114 AD2d 772; Briton v Knott Hotels Corp, 111 AD2d 62; Mamunes v Szczepanski, 70 AD2d 684; Di Bassi v Gosenhauser, 36 Misc 2d 799). Accordingly, the court directed the attorney to submit his time records for the period 1970 to 1982 for in camera review.

A review of the time records does not disclose evidence of excessive or "double" billing. The records indicate an approximate average of 7.95 billing hours per day over a twelve year



period. This approximation was arrived at by a random sampling of three months a year for each of the twelve years. Figures were averaged for the year and then for the total of the twelve year period. The hours indicated do not exceed the usual number expended by an attorney and do not indicate excessive billing, which would merit further review or disclosure of the records after redaction of clients' names.

Income tax returns are not discoverable absent a showing of necessity (*Matthews v Industrial Piping Co*, supra) based on the public policy of encouraging the filing of accurate returns (*Production or Privilege; Income Tax Returns and the Federal Rules*, 1982 Tr Law Guide 1). Production of income tax returns has been denied where the information sought was not necessary to develop material facts in support of the



party's position (Smith v Providence Washington Insurance Co, 51 AD2d 1074; Conway v Hewitt 7 AD2d 931; Turnpike Delicatessen and Restaurant, 34 Misc 2d 183).

Here, the representative plaintiff seeks the returns in order to establish his allegation of excessive billing. The plaintiff contends that disclosure of the attorney's returns will indicate income from other clients which could not have been generated unless there had been double billing. There are no schedules in an income tax return indicative of the billing of individual clients (See Terzo v Manufacturers Hanover Trust Co, 68 AD2d 865). Additionally, even if the tax returns indicated an amount substantially in excess of the total amount billed to the plaintiff the returns would not reflect the number of





hours expended to produce the additional income. Thus, the tax returns cannot be used to develop material facts in support of the plaintiff's contention.

It is true that the attorney has injected his income as an issue in this case because of his position that lost income from other sources should be taken into account when the court determines a reasonable fee. That is, the attorney contends that he was unable to work on other cases because of the time spent on the instant litigation. This is one criterion for determining attorneys' fees in a "class" action. The critical facts relevant to this issue are the number of hours expended on this litigation compared to the total number of hours worked. These facts will indicate the amount of time which could not be devoted to other cases.



A421

For the foregoing reasons, the application for an order directing disclosure of income tax returns is denied. The records will be returned to the attorney.

This decision constitutes an order of the court.

Dated: August 19, 1988

/s/ C. Raymond Radigan  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ-	:	File No.
ually and as a Partner	:	148704
of Simon Cohen Real	:	
Estate and Management	:	Dec. No. 1092
Company,	:	
	:	<u>DECISION</u>
Plaintiff,	:	
	:	
- against -	:	
	:	
ROBERT J. REED, et al.,	:	
	:	
Defendants.	:	

-----X

In this derivative action, the remaining questions to be resolved are the amount of counsel fees to be allowed from the settlement fund pursuant to Section 115-a subdivision [5] of the Partnership Law and the allocation of the balance of the fund among the partners.

The representative plaintiff, Robert Cohen, commenced this action on behalf of the partners Simon Cohen Real Estate and Management Company, Simon



Cohen Realty Company, Simon Cohen Company and Alger Realty Company, alleging fraud, mismanagement and waste of partnership assets. The executors of the estate of Simon Cohen are among the defendants. The complaint is comprised of seventeen causes of action, sixteen of which were commenced by Robert Cohen as a general and limited partner of the partnerships. The seventeenth cause of action is brought by Robert Cohen, individually.

The action was commenced in the Supreme Court, Nassau County and transferred to the Surrogate's Court. By order dated January 11, 1980, the defendants' motion for summary was granted in part, dismissing the first and third causes of action.

The trial of this action began in 1980. During the period of time that the trial was in progress,





settlement negotiations took place with the assistance of the court. In 1982, the plaintiffs submitted a proposed settlement to the court and the defendants submitted a counter-proposal. A difference of opinion arose between Robert Cohen and his counsel, Stephen Hochhauser, as to the advisability of accepting the settlement offer made by the defendants. According to Cohen, Hochhauser refused to continue representation of the plaintiffs in this matter unless Cohen agreed to accept the proposed settlement. Cohen moved for an order permitting the substitution of Hochhauser, and Hochhauser cross-moved for advice and direction, contending that Cohen had a personal animosity towards one of the defendants, Robert Reed, which prevented Cohen from exercising independent judgment regarding the settlement. Hochhauser



contended that Cohen should be removed as the representative plaintiff.

In a decision dated August 2, 1982, the court determined that it was appropriate for counsel for the "class" to seek advice and direction if he believed that their interests were jeopardized. The court directed the plaintiff to mail a copy of the August 2, 1982 decision and a "Notice of Hearing" to the partners. This Notice apprised the partners of (1) the status of settlement negotiations, (2) Hochhauser's allegations concerning Cohen's conduct, (3) the motion for an order substituting counsel and (4) the date of the scheduled hearing on items (2) and (3). A hearing was subsequently held, and the motion for an order substituting counsel for the "class" was granted in a subsequent decision. The decision noted that Cohen had a right to



substitute his counsel on the seventeenth cause of action, without court approval and granted the substitution as to representation of the "class". The court further found that although Robert Cohen apparently disliked Robert Reed, the proof was insufficient to require disqualification (NYLJ 1/26/83, p. 15 col. 1). It was further noted that the amount chargeable to the partnerships for services rendered by Hochhauser would depend upon the recovery in the action and the question of attorneys' fees for services rendered on behalf of the partners and to Robert Cohen, individually, would be deferred until a decision on the merits or the approval of a settlement agreement.

In the decision dated January 13, 1983, the Court determined that the partners should be apprised of



the defendants' latest settlement proposal. A "Notice of Settlement Offer", "Description of Litigation" and a copy of the proposal were forwarded to each of the partners, who were invited to communicate their acceptance or rejection of the offer on or before February 16, 1983. The court reviewed the responses (NYLJ 4/19/83 p. 14 col. 6), which overwhelmingly favored acceptance of the proposal. Some of the partners indicated that the settlement proposal would be acceptable to them if three conditions were incorporated. The court determined that for the next stage of the proceedings these conditions would be deemed incorporated into the settlement proposal and at a later date the defendants would have an opportunity to reject the proposal. A hearing was then held to permit the representative plaintiff or any partner to offer proof





as to why the proposed settlement should not be approved. None of the partners appeared at the hearing except Robert Cohen. In a decision dated April 27, 1984 the court approved the proposed settlement with the inclusion of the three conditions, over the objection of Robert Cohen, finding that a representative plaintiff had a duty not only to vigorously prosecute an action but to accept a settlement which is in the best interest of the "class" (Norman v Arcs Equities Corp, 72 F.R.D. 502) and upon refusal of the representative plaintiff to accept such a settlement, the court could approve it without his consent (Flinn v FMC Corp, 528 F2d 1169 cer den, 424 US 967). At the time of the approval, 55 days had been expended on the trial and the transcript in this action already totalled 5,500 pages. The court was satisfied from the record



that the settlement proposal, which provided for a payment of \$500,000 as well as nonmonetary benefits, was in the partners best interests. On appeal by Robert Cohen from the order entered on the decision of April 27, 1984, the Appellate Division affirmed (120 AD2d 480). Applications for leave to appeal to The Court of Appeals were dismissed, the last decision stating that this court's order was not a final order (68 NY2d 807; 69 NY2d 1038; 70 NY2d 899).

In order to finalize this matter, the Court forwarded to the partners a "Notice of Hearing" on the question of attorneys' fees and allocation of the settlement fund and a hearing was thereafter held.

The Court is now required to determine the amount of fees allowable from the settlement fund. The only attorney who has submitted a petition



and sought the fixation of his fee is Stephen Hochhauser.

A further issue to be addressed is the amount of the fees to be paid by Robert Cohen, individually, on the seventeenth cause of action. Although Cohen argues that the Court lacks jurisdiction over this issue, the Court is satisfied that it has jurisdiction to determine the fees to which Hochhauser is entitled for representing Cohen individually in an action tried in this court, in which the executors of an estate were parties (Matter of Piccone, 57 NY2d 278).

In 1972, Hochhauser and Robert Cohen, individually entered into a retainer agreement which provided for payment at an hourly rate and if this proved to be "inadequate" based on the recovery, a bonus to be paid on the basis of results achieved. A subsequent



agreement dated September 28, 1979 provided for a prospective increase in the hourly rate. Pursuant to these agreements, Cohen paid Hochhauser a total of \$311,245 in fees.

Cohen alleges that Hochhauser refused to proceed unless Cohen agreed to the proposed settlement and that this amounted to an unjustified withdrawal from the case. In the alternative, Cohen alleges that Hochhauser was discharged for cause. Under either theory, Cohen contends that Hochhauser should forfeit compensation. Hochhauser alleges that the principal reason for the disagreement between himself and Cohen was not acceptance of the settlement proposal but problems which arose because Cohen attempted to dictate trial strategy and further had not paid outstanding bills. Hochhauser contends that he was discharged without cause and





he is entitled to compensation on a quantum meruit basis.

Neither Hochhauser's support of the proposed settlement nor his application for advice and direction constituted an abandonment or withdrawal from the case. As the court noted in its decision of August 2, 1982 counsel for the "class" has a special fiduciary relationship with them (Pettway v American Cast Iron Pipe Co., 576 F2d 1157, cert den 439 US 1115) and a duty to protect the interests of the class where counsel feels those interests are jeopardized by the representative plaintiff. The Appellate Division affirmed this court's decision that Cohen had failed to act in the best interests of the "class" by refusing to consent to the stipulation (Cohen v Reed, 120 AD2d 480) nor does the court believe that Hochhauser was motivated by



bad faith. Further, the record does not support a conclusion that Hochhauser was discharged for cause. The court finds Cohen's allegations concerning the quality of Hochhauser's services to be without merit.

The total fee now requested by Hochhauser for the period 1972 through 1981 is now \$555,398.75, based on an increased valuation of the hourly billing rate, plus \$10,062.00 for experts' fees and \$875.00 for transcripts. Additionally, Hochhauser seeks interest for 79 months on the difference between \$311,245 already paid and the amount he seeks on a quantum meruit basis. Alternatively, Hochhauser contends that if the court views his services as having been completed by the presentation to Cohen of the offer of settlement, the retainer agreement is



binding as to the hourly rate and as to the bonus provision (SM 191).

Whether or not it was the intention of the parties that the retainer agreement between Hochhauser and Cohen would bind the members of the "class", the retainer agreement was never binding on them. The sum recoverable as attorneys' fees from the settlement fund is not measured by the amount which the representative plaintiff has expended or contracted (1 Speiser, Attorney's Fees, sec 11:34 [1973]). The determination of fees is solely within the discretion of the court. Parenthetically, the defendants lack standing to question the payment of attorneys' fees from the fund.

Although the general rule in American procedure is not to permit the prevailing party recovery of attorneys' fees, an exception is carved out for



derivative and class actions to prevent unjust enrichment to those who benefit from the creation of a "common fund." New York's statutes and case law follow the federal statutes and decisions (Sternberg v Citicorp Credit Services, Inc., 110 Misc2d 804; Washington Federal Savings and Loan Association v Village Mall, 90 Misc2d 227; CPLR 909). Section 115-a subdivision (5) of the Partnership Law specifically provides for allocation of part of the recovery to attorneys' fees. The fact that this matter was settled prior to conclusion of the trial does not affect counsel's right to compensation.

Both Cohen and Hochhauser argue that the entire monetary recovery should be allocated to legal fees and that this was the understanding of the parties during settlement negotiations. The stipulation of settlement, however,





does not so provide. Further, it was not the Court's understanding during the settlement negotiations that the entire settlement fund was automatically to be applied to attorneys' fees. As previously stated, the amount of attorneys' fees was to be determined by the court. The allegation that the funds were to be applied solely to attorneys' fees is specifically refuted by defendants' counsel.

The first step in the determination of attorneys' fees is an assessment of the reasonable hourly rate which is then multiplied by the number of hours expended for the benefit of the "class" to create a base figure (Lindy Brothers Builders, Inc. of Philadelphia v America Radiator and Standard Sanitary Corp., 540 F2d 102 and 487 F2d 161). Decisions in this area consistently recognize the difficulty in arriving at



an hourly rate for professional services. the starting point is counsel's usual billing rate, as to which Hochhauser testified. However, this may be adjusted upwards or downwards depending on the circumstances of each case. In the instant case Hochhauser did not submit any evidence as to the "prevailing" rate for the type of services rendered for each of the years in question. However, it would appear that the hourly rates agreed to in the retainer agreement are consistent with hourly rates assigned by courts in similar litigation. Although the hourly rate applicable when work was done may be adjusted upwards to compensate an attorney for deferrals in payment (Weiss v York Hospital, 628 F Supp 1392), here Hochhauser received payment on a regular basis.



The record fails to distinguish the number of hours expended on the first sixteen causes of action and the seventeenth cause of action. For the purpose of the initial computations, the court will assume that all of the time expended was in connection with the first sixteen causes of action.

Cohen disputes Hochhauser's allegation that a total of 4,299.50 hours were expended up until 1982. Cohen sought disclosure of copies of Hochhauser's tax returns in connection with his allegations that Hochhauser had billed Cohen for time which was spent on other clients. Noting that Cohen had previously sought records of Hochhauser's firm, the court directed Hochhauser to submit his diaries for in camera review, and the Court took a random sample of three months per year



for each of the twelve years of diaries submitted. Figures were averaged for the year and then for the total of the twelve year period. Since the hours indicated did not exceed the usual number expended by an attorney and did not indicate excessive billing (NYLJ 8/25/88, p.22 col.3), disclosure of the diaries was denied. Disclosure of the tax returns was denied on the grounds that they should only be subject to disclosure where necessary and also that they would not indicate the amount of income generated by each client.

The Court is satisfied that the number of hours alleged were expended. Cohen admits that he received monthly bills. Hochhauser testified that Cohen received the bills in detail when they were presented and that Cohen questioned Hochhauser when he believed an error had been made. The evidence



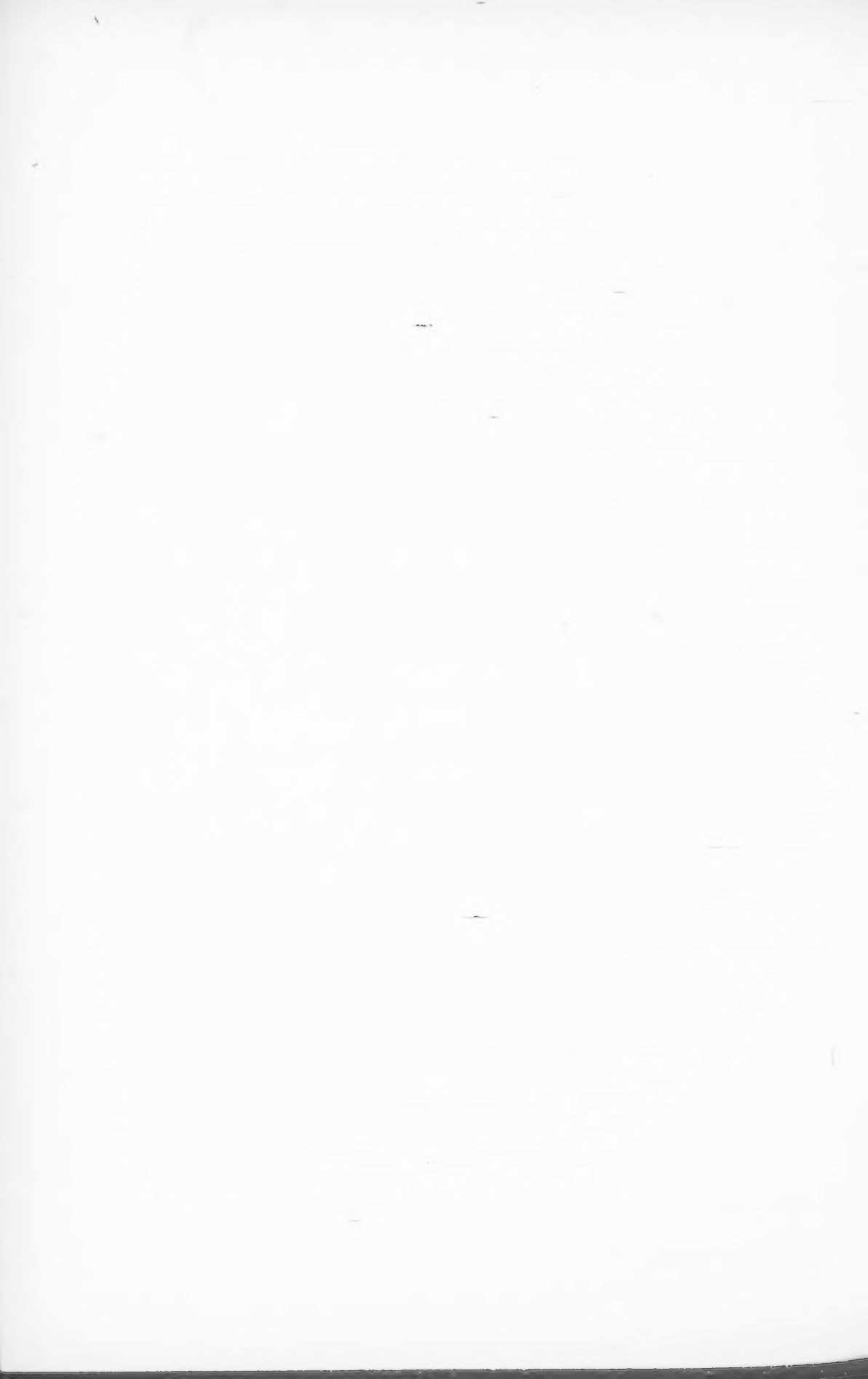


supports the conclusion that the bills were carefully scrutinized. Hochhauser alleges that there remains 133.25 hours in uncompensated services for 1982.

These services are not broken down into office time and court time nor are the services rendered on the seventeenth cause of action distinguished. For the purpose of the initial computation, these additional services, which are limited in amount in relation to the overall hours, will be disregarded.

Accordingly, the Court finds that for the purpose of the initial computation of legal fees \$311,245 is the base figure.

The next stage is to evaluate this figure within the context of the total amount of the recovery. While the court seeks to compensate counsel for the work performed, it must also protect the interests of the beneficiaries of



the fund whose redress is the reason for the creation of the fund (In re Chicken Antitrust Litigation, 560 F Supp 963).

The total amount of the monetary recovery in this case was \$500,000 (plus interest). The usual amount of attorneys' fees allowed in this type of action is between 20% and 30% of the fund with 50% regarded as the uppermost limit (Newberg, Attorney Fee Awards, sec 2.08, [1986]).

A factor to be considered in determining the award is any nonmonetary benefit to the beneficiaries (Mills v Electric Auto-Lite Co., 396 US 375). A second factor to be considered is the burden placed on small firm by massive litigation (Municipal authority of Town of Bloomsburg v Commonwealth of Pennsylvania, 527 F Supp 982). The court must also take into account the



substantial skill and experience of counsel.

A further factor to be considered is the novelty and complexity of the issues raised. Here, the questions of law were not novel although the factual issues were complex and required extensive discovery.

However, these additional factors are not sufficient to justify an award from the settlement funds which is even close to the amount requested. Hochhauser vigorously urged approval of the settlement of \$500,000, which was ultimately approved on the grounds that it was in the best interests of the partners. He now seeks the total amount of the recovery for the payment of his fees. Hochhauser contends that the contingency factor that is, the fact that no recovery might have been obtained from which legal fees could be



paid, should be considered. However, the contingency factor can be a two-edged sword (See Kane v Martin Paint Stores, Inc., 439 F Supp 1054). While in some cases it results in an increase in the fee when the chance of success was uncertain, at the same time in the context of determining the fee to be allowed in a derivative action, a case in which only a limited recovery can reasonably be anticipated might not justify the expenditure of enormous amounts of time. In the decision approving the settlement proposal, the court noted the difficulties of proof encountered by the plaintiffs as well as the obstacles imposed by the statute of limitations. Additionally, Cohen and Hochhauser had a retainer agreement which assured Hochhauser of payment.

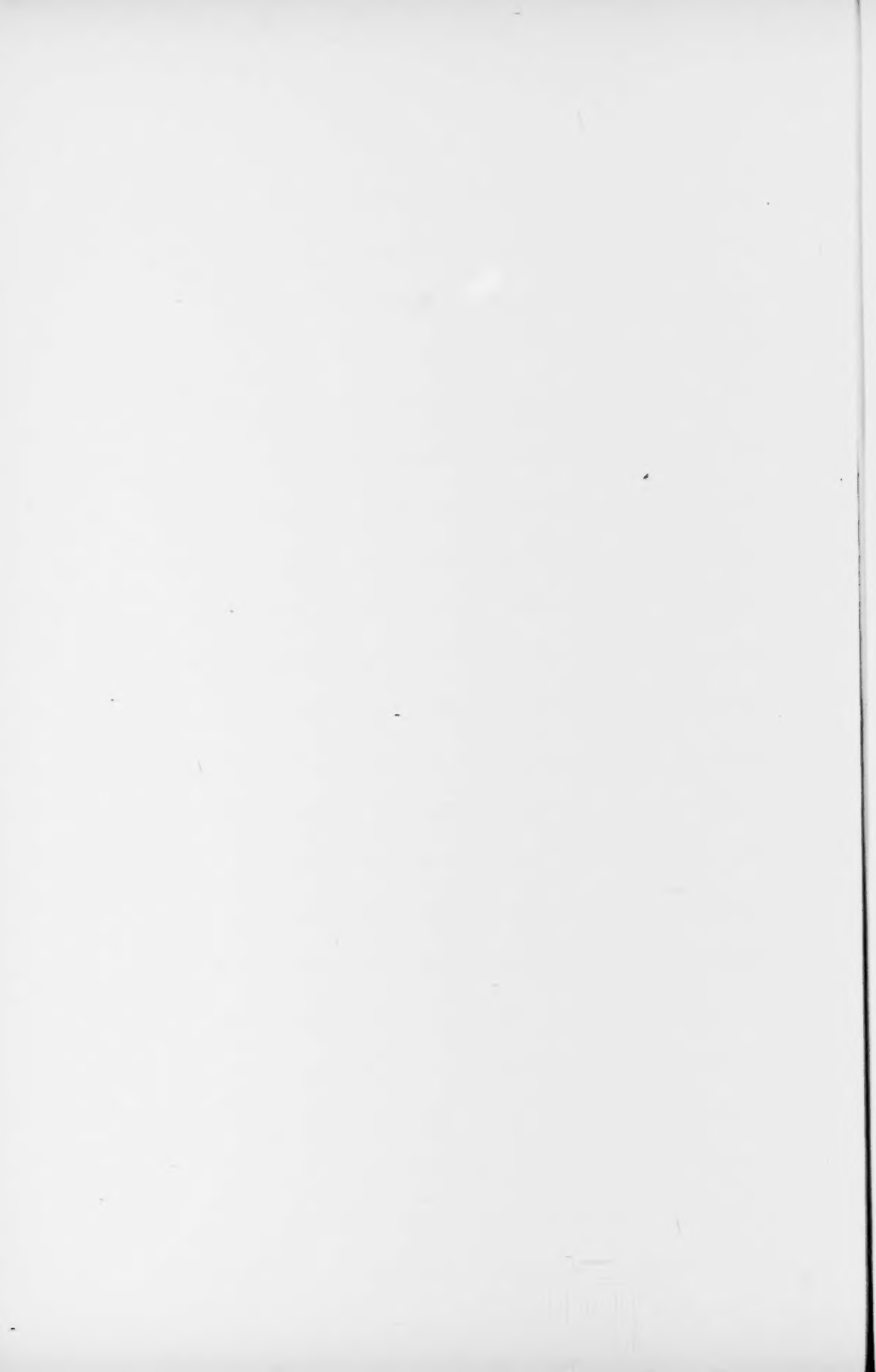
Accordingly, the court finds that a reasonable attorney's fee for





services rendered to the beneficiaries of the fund is \$175,000 plus \$10,062.00 for experts fees and \$875.00 for transcripts.

Accordingly, \$11,937.00 is to be paid from the settlement fund directly to Hochhauser for the payment of experts fees and transcripts. Robert Cohen is to be paid \$175,000 from the settlement fund to reimburse him to the extent of the reasonable fees fixed. Robert Cohen is also entitled to reimbursement for proper disbursements. Mr. Hochhauser should submit an itemization of those disbursements reimbursed or paid by Robert Cohen prior to Hochhauser's discharge. The balance of the fees for which Mr. Cohen contracted with Mr. Hochhauser are the responsibility of Mr. Cohen, individually, as he contracted personally for these services (Bakery



and Confectionary Workers International Union of America v Ratner, 335 F2d 691).

All fees payable to Hochhauser for his representation of the "class" whether they are to be reimbursed to Cohen from the settlement fund or not, have been paid.

As to the services rendered in connection with the seventeenth cause of action, it is not necessary to determine what percentage of the prior amounts already paid represent payment on the first sixteen causes of action as distinguished from the seventeenth cause of action. Cohen is liable for the services rendered on all causes of action based on his contract with Hochhauser. Whether a client is entitled to a review of the value of the services already compensated where the attorney is discharged without cause depends on the intentions of the parties



and the surrounding circumstances, such as misconduct on the part of the attorney (Leibowitz v Szoverffy, 97 Misc2d 854). The court finds no circumstances warranting a review of the sums previously paid. In any event, the fees paid to Hochhauser at the hourly rate provided by the retainer agreement are found to be fair and reasonable.

As to uncompensated services in 1982 the record fails to distinguish between services rendered to the "class" and those rendered in connection with the seventeenth cause of action. The Court has already determined the compensation for services rendered to the "class." The question remaining is the quantum meruit value of the services rendered in connection with the seventeenth cause of action (Brill v Kad, 61 AD2d 1000). Since the seventeenth cause of action was not part



of the settlement agreement, it continued on after Hochhauser's discharge requiring the application of quantum meruit rather than the retainer. As the retainer agreement is not enforceable, the bonus provision is inapplicable.

The court will afford Mr. Hochhauser an opportunity to establish services rendered in connection with the seventeenth cause of action in 1982, if he is so advised provided he requests a hearing by January 11, 1989.

On the question of the allocation of the settlement fund the record is insufficient to make a determination with respect to the division of the balance of the recovery remaining after the payment of legal fees. Accordingly, a hearing must be held on this question. Counsel for the





representative plaintiff should prepare a Notice of Hearing to be forwarded to the individual partners. The proposed Notice of Hearing should be sent to the court and if found to be in proper form will be forwarded to the partners. The expense of copying and mailing the Notice will be deducted from the settlement fund. The hearing on this question will take place on February 27, 1989, and the representative plaintiff is requested to forward the proposed Notice to the Court within two weeks of the date of this decision.

Settle order.

Dated: December 30, 1988

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : File No. 148704  
ually and as a partner  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: NOTICE OF  
Co., suing on behalf of HEARING  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
MANAGEMENT CO., SIMON :  
COHEN REALTY CO., and  
ALJER CO., :

Defendants. :

-----X

NOTICE OF HEARING

TO THE PARTNERS OF SIMON COHEN REALTY  
COMPANY AND SIMON COHEN REAL ESTATE AND  
MANAGEMENT COMPANY AND SIMON COHEN  
COMPANY:

On November 27, 1984, this  
Court, by Decree, approved a settlement  
of this action.

There is presently available  
for allocation to Simon Cohen Realty  
Company and Simon Cohen Realty Estate &  
Management Company the sum of \$500,000.

The Court has determined by  
decision dated December 30, 1988, that  
from the settlement fund the  
representative Plaintiff, Robert Cohen,  
is to be reimbursed the sum of \$175,000  
for attorney's fees previously paid by  
him, as well as an additional amount for



disbursements still to be determined. The Court has also directed that out of the said fund there be paid to Stephen Hochhauser, Esq. the sum of \$10,062 as reimbursement for expert witness fees advanced by him.

The Court will hold a hearing, at which any of the partners may be heard, at 10:00 a.m. on the 27th day of February, 1989 at the Courthouse, 262 Old Country Road, Mineola, New York, for the purpose of determining the allocation of the balance of the \$500,000 fund between Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company.

A further issue has been raised concerning the payment of interest on the settlement funds. The decision approving the settlement does not provide for interest. However, Robert Cohen advances the argument that





interest should be paid. Any partner will be heard on this question, as well, at the hearing.

Dated: February 6, 1989

/s/  
VINCENT P. MALLAMO  
Acting Chief Clerk of  
the Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, Individ- : DECISION  
ually and as a Partner  
of Simon Cohen Real : File No. 148704  
Estate and Management  
Company, : Dec. No. 339

Plaintiffs, :

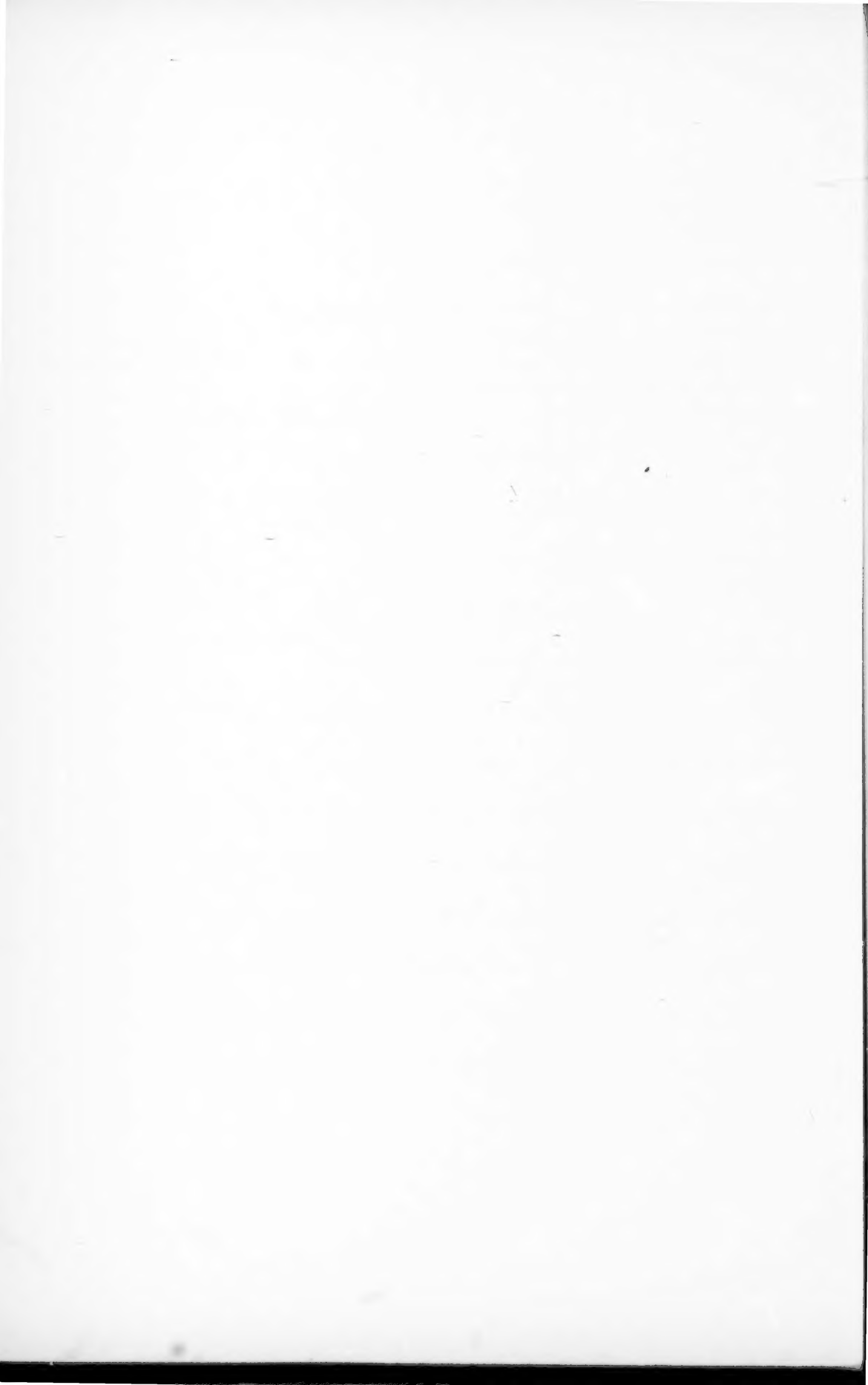
-against- :

ROBERT J. REED, et al.,:

Defendants. :

-----X

The remaining question to be resolved in this derivative action is the allocation of the balance of a \$500,000 settlement fund (See Notice of Hearing dated February 6, 1989). The balance shall be divided equally between the Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company.



Settle decree on five days'  
notice with five additional days if  
service is made by mail.

Dated: April 13, 1989

/s/  
C. RAYMOND RADIGAN  
Judge of the  
Surrogate's Court



SURROGATE'S COURT:  
COUNTY OF NASSAU

-----X

ROBERT COHEN, individ- : Index No.  
ually and as a partner : 148704  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: SUPPLEMENTAL  
Co., suing on behalf of DECREE  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :





COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO., and  
 ALJER CO., :

Defendants. :

-----X

The Court, by decree entered November 27, 1984, having ordered that a settlement fund of \$500,000 be paid to Simon Cohen Realty Company and to Simon Cohen Real Estate Management Company, and having further ordered that a hearing should be held to determine what portion thereof, if any, should be allocated to the Simon Cohen Realty Company and Simon Cohen Real Estate and Management Company, and the Court having notified all parties and the partners of said partnerships of a hearing thereon by notice of hearing dated February 6, 1989, and the Court having held such hearing, on February 27, 1989, and the Court having



rendered its decision dated April 13,  
1989,

NOW, THEREFORE, upon motion of  
Schoeman, Marsh, Updike & Welt,  
attorneys for plaintiff Robert Cohen, it  
is hereby

ORDERED, ADJUDGED and DECREED  
that the settlement fund of \$500,000  
herein be divided equally between Simon  
Cohen Realty Company and Simon Cohen  
Real Estate and Management Company.

Dated: May 9, 1989

/s/ C. Raymond Radigan  
SURROGATE



SURROGATE'S COURT:  
COUNTY OF NASSAU

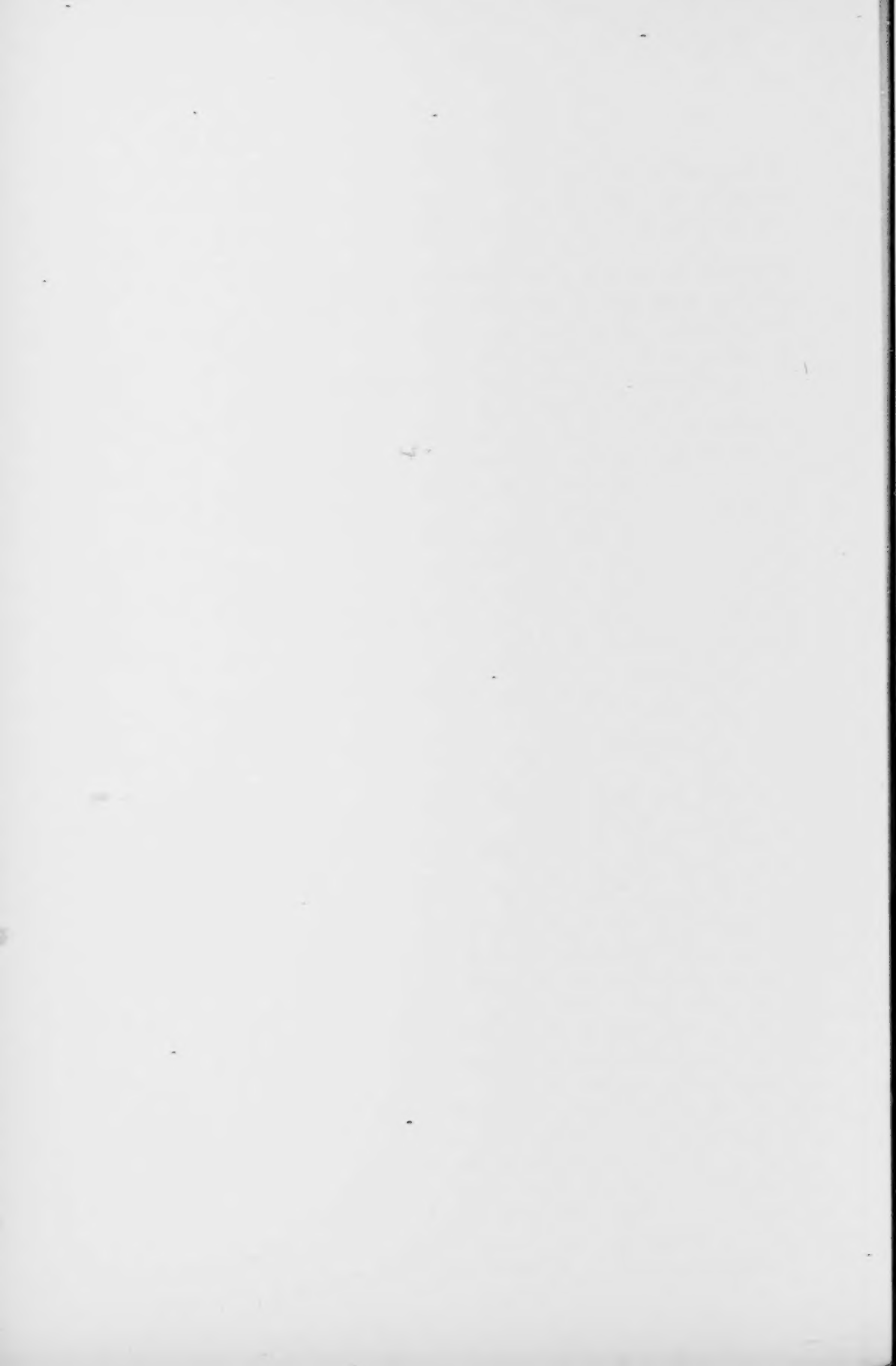
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ROBERT COHEN, Individ- : Index No.  
ually and as a partner 148704  
of Simon Cohen Real :  
Estate and Management  
Co., Simon Cohen Realty: ORDER  
Co., suing on behalf of  
himself and all other :  
partners, both general  
and limited, and in the:  
right and on behalf of  
Simon Cohen Real Estate:  
& Management Co., Simon  
Cohen Realty Co., Simon:  
Cohen Company, and  
Aljer Realty Co., :

Plaintiff, :

-against- :

ROBERT J. REED, SIDNEY :  
HACKELL, BEATRICE  
POTTER, and THE FIRST :  
NATIONAL CITY BANK,  
Individually and as :  
Executors of the Last  
Will and Testament of :  
Simon Cohen, deceased,  
WILLIAM B.F. WERNER, :  
Individually and doing  
business as Mid Island :  
Hospital, JUAN SOTO,  
ELAINE WILSCHEK, J.S.K.:  
CLEANING SERVICES,  
INC., JUDAH FEINERMAN, :  
JASDANE, INC., SHELDON  
KATZ, VOLUME FEEDING, :  
INC., DADGAB, INC.,  
BRIMSCO, INC., SIMON :



COHEN REAL ESTATE &  
 MANAGEMENT CO., SIMON :  
 COHEN REALTY CO., and  
 ALJER CO., :

Defendants. :

-----X

The Court, by decree entered November 27, 1984, having ordered that a settlement fund of \$500,000 be paid to Simon Cohen Realty Company and to Simon Cohen Real Estate Management Company, and having further ordered that a hearing should be held to determine what portion thereof, if any, should be allocated to the payment of attorneys fees for services rendered to the partnerships and what if any reimbursement should be made to the representative plaintiff for attorneys' fees and expenses paid on behalf of the partnerships, and the Court having notified all parties and the partners of said partnerships of a hearing thereon by notice of hearing dated April 28,





1988, and the Court having held such hearing on May 31, and June 1 and 2, 1988, and Robert Cohen having applied at such hearing for reimbursement of attorneys' fees and disbursements incurred and paid by him in these proceedings, and Stephen Hochhauser having applied at such hearing for attorneys' fees and for reimbursement of disbursements incurred and paid by him in these proceedings, and the Court having rendered its decision dated December 30, 1988, as amended by order dated February 1, 1989, and the Court having received a summary of disbursements incurred and paid by Robert Cohen by letter dated January 13, 1989 from Schoeman, Marsh, Updike & Welt and not having received any objections to said summary,

NOW, THEREFORE, upon motion of Schoeman, Marsh, Updike & Walt,



attorneys for the plaintiff Robert Cohen, it is hereby

ORDERED, that, prior to any distribution of the settlement fund to Simon Cohen Realty Company or to Simon Cohen Real Estate Management Company, Robert Cohen shall be paid from the \$500,000 settlement fund the sum of \$175,000 as reimbursement for reasonable attorneys' fees incurred and paid by him in these proceedings and an additional sum of \$57,114 as reimbursement for proper disbursements incurred and paid by him in these proceedings; and it is further

ORDERED, that, prior to any distribution of the settlement fund to Simon Cohen Realty Company or to Simon Cohen Real Estate Management Company, Stephen Hochhauser shall be paid from the \$500,000 settlement fund the sum of \$10,062 as reimbursement for expert



witness fee disbursements previously incurred by him in these proceedings, and it is further

ORDERED, that, except as otherwise provided herein, the applications of Robert Cohen and Stephen Hochhauser for payment or reimbursement of attorneys' fees and disbursements are denied.

Dated: May 10, 1989

/s/ C. Raymond Radigan  
SURROGATE



STATE OF NEW YORK  
COURT OF APPEALS

-----X

Robert Cohen, Individ-	:	<u>ORDER</u>
ually &c., et al.,	:	
	:	
Estate Co., et al.,	:	
	:	
Appellants,	:	2-13
	:	<u>Mo. No. 841</u>
v.	:	
	:	
Robert J. Reed, et al.,	:	
	:	
Respondents.	:	

-----X

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.





A464

/s/  
Donald M. Sheraw  
Clerk of the Court

[ENTERED October 26, 1989]